

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 27

F. J. GUNTHER, PETITIONER,

vs.

SAN DIEGO & ARIZONA EASTERN
RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

I N D E X

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**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION**

No. 2459-SD-W

No. 36 291

F. J. GUNTHER, Petitioner,

—vs.—

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY,
a corporation, Defendant.

PETITION TO ENFORCE AWARD AND ORDER OF NATIONAL RAIL-
ROAD ADJUSTMENT BOARD—Filed September 26, 1960

Petitioner alleges:

I

This action is brought pursuant to 45 USCA 153(p) and the above entitled court has jurisdiction of said action under the provisions thereof.

II

At all times herein mentioned, defendant was, and now is, a corporation organized and existing pursuant to the laws of the State of Nevada. At all such times, said defendant was, and now is, a carrier by railroad subject to the Interstate Commerce Act with its principal operating office located in the Southern District of California.

III

Petitioner was employed by defendant on December 18, 1916, as a fireman and thereafter was continuously in the active service of defendant until disqualified therefrom as

[fol. 3] hereinafter alleged. Petitioner was promoted to locomotive engineer on December 4, 1923, and his seniority as a locomotive engineer as established by the collective bargaining agreement hereinafter referred to runs from that date.

IV

At all times hereinafter mentioned, petitioner's employment with defendant was governed by the terms of the Agreement by and between the San Diego & Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers. Said Agreement does not require employees covered by same to retire from active service at any stated age limit. By the terms of said Agreement, at all times hereinafter mentioned the petitioner had seniority rights which entitled him to continue in the active service of defendant as a locomotive engineer.

V

On December 30, 1954, shortly after petitioner's 71st birthday, defendant removed petitioner from active service on the ground that he was not physically qualified to perform the duties of locomotive engineer. At said time, petitioner's physical and mental fitness was comparable to that of men much younger than he and he was qualified physically to perform the duties which defendant required of its locomotive engineers. Said disqualification of petitioner by defendant was, in fact, imposition upon petitioner of compulsory retirement in violation of petitioner's rights under said Agreement.

VI

Following said disqualification, petitioner presented his claim for reinstatement to active service to defendant and, upon denial thereof, submitted said claim to the National Railroad Adjustment Board, First Division, in conformity with the provisions of the Railway Labor Act. Said claim [fol. 4] was assigned Docket No. 33-531 by said Board.

Thereafter, on October 2, 1956, said Board made its findings upon said claim, issued its award thereon and made its order pursuant to said award. A true copy of said findings, award and order, marked "Exhibit A," is attached hereto and incorporated herein by reference.

VII

Following the issuance of said findings, award and order, the neutral board of physicians therein provided for was selected. Although two of the members of said board reported that they found no defect which, in their opinion, would prevent petitioner from performing his duties as a locomotive engineer, defendant again failed and refused to reinstate petitioner to active service.

VIII

Thereafter, on June 30, 1958, petitioner filed a supplemental submission of said claim with said National Railroad Adjustment Board, First Division, asking said Board to render an interpretation of said award of October 2, 1956, and on October 8, 1958, said Board made its interpretation, issued its award thereon, and made its order pursuant to said award, a true copy of said interpretation, award and order, marked "Exhibit B," is attached hereto and incorporated herein by reference.

IX

Following the making and issuance of said interpretation, award and order, petitioner made demand upon defendant to comply with the terms thereof but defendant failed and refused to do so and has continued to fail and refuse to comply with same to the date hereof.

X

By reason of the premises, petitioner has been deprived of his right, pursuant to said Agreement, to continue in the active service of defendant as a locomotive engineer

[fol. 5] since December 30, 1954 and has thereby sustained a wage loss to the date hereof in the approximate amount of \$50,000. Petitioner prays leave, upon ascertaining the exact amount of said wage loss, to amend this petition accordingly.

Wherefore, petitioner prays

1. For an order of Court enforcing the award and order of the National Railroad Adjustment Board, First Division, in said Adjustment Board proceeding, Docket No. 33-531,

2. For an order of this Court requiring defendant to reinstate petitioner to active service in accordance with his seniority under said Agreement,

3. For damages in the amount required to compensate petitioner for wages and other monetary benefits lost by reason of the premises, and

4. For such other and further relief as the Court deems meet and just in the premises.

Date: September 23, 1960.

Clifton Hildebrand, Hildebrand, Bills & McLeod,
Charles W. Decker, By Charles W. Decker, Attor-
neys for Petitioner.

[File endorsement omitted]

[fol. 6] *Duly sworn to by Fred J. Gunther, jurat omitted in printing.*

[fol. 7]

EXHIBIT A TO PETITION

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

With Referee Mortimer Stone

Award 17 646

Docket 33 531

PARTIES	(Brotherhood of Locomotive Firemen and
TO	(Enginemen
DISPUTE	(San Diego and Arizona Eastern Railway
	(Company

STATEMENT OF CLAIM: "Request for reinstatement of Engineer F. J. Gunther to service with all seniority rights unimpaired and pay for all time lost account of physical disqualified and taken out of service December 30, 1954.

FINDINGS The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claim of engineer for reinstatement in service and pay for time lost. Shortly after his 71st birthday claimant was disqualified from service by the chief surgeon on the basis of a physical examination by a company physician at Los Angeles. Upon his request he was then sent to the Southern Pacific General Hospital at San Francisco and there examined by carrier's medical superintendent following which the chief surgeon determined that he should not be returned to service.

Thereupon claimant went for examination to a recognized specialist at San Diego and on the basis of his report requested that a three doctor board be appointed to reexamine his physical qualification for return to service.

Upon denial of this request claim for reinstatement and back pay was filed in this Division resulting in Award 17 161 in which the claim was dismissed without prejudice on the ground that there was no showing whether or not claimant's physician and the company physicians disagreed as to claimant's physical qualifications. Now the claim has been progressed again with the inclusion of further statement by claimant's physician.

Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appointment of a neutral medical board as here sought and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.

It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employes to remain in service. It is true also that the [fol. 8] employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service.

If carrier through its medical staff has removed an employe from service in good faith, on the basis of a fair standard of fitness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

Since determination of the facts necessary to enable the Division to make proper award on such issue requires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by

carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians.

While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians.

If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians.

AWARD: Claim disposed of per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: /s/ J. M. MACLEOD
Executive Secretary

Dated at Chicago, Illinois,
This 2nd day of October 1956.

[fol. 9]

Form 2

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

Award 17 646

Docket 33 531

ORDER

TO: San Diego and Arizona Eastern Railway Company
Mr. W. B. Eastman, Vice President and General Manager

The carrier addressed, party to the docket identified above, is hereby ordered to make effective the award, which is attached and made a part hereof, as therein set forth and, if the award includes a requirement for the payment of money, to pay the employe (or employes) the sum to which he is (or they are) entitled on or before November 2, 1956

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: /s/ J. M. MacLEOD
Executive Secretary

Dated at Chicago, Illinois,
This 2nd day of October 1956.

[fol. 10]

EXHIBIT B TO PETITION

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

With Referee Mortimer Stone

INTERPRETATION

Award 17 646

Docket 33 531

PARTIES	(Brotherhood of Locomotive Firemen and
TO	(Enginemen
DISPUTE	(San Diego and Arizona Eastern Railway
	(Company

INTERPRETATION

This docket presents claim previously before this Division with the present Referee sitting as a Member, which resulted in Award 17 646. As appears therein claimant had been held by carrier's chief surgeon to be no longer physically qualified to remain in service and the Division determined that there was sufficient disagreement as to claimant's physical condition to justify inquiry and finding by a board of three physicians, as not unusually required. It was declared that if the decision of the majority of such board should support the decision of carrier's chief surgeon the claim would be denied; if not, it would be sustained with pay pursuant to rule on the property, from October 15, 1955.

On June 30, 1958 claimant filed with the Division a supplemental submission setting out that following said award a board of three physicians had been agreed on and established as provided for therein, and that the findings and decision of the majority of said board did not support the decision of carrier's chief surgeon but found that claimant had no physical defect which would prevent him from

carrying on his usual occupation, but that carrier advised claimant that "the findings of the three doctor board have been reviewed by the chief surgeon and interpreted to be such that you should not be returned to duty", and refused to reinstate claimant or pay him for time lost. Wherefore claimant sought a new or supplemental award or an interpretation, to make absolute his right to reinstatement and pay for time lost.

Carrier now requests permission to file an answer to petitioner's submission and asserts that the Referee has authority to resolve any question of procedure in the matter before him. Claimant's submission was filed more than ninety days before the request without any request appearing for extension of time. In the meantime the Division deadlocked on the disposition of the dispute and it was submitted to the National Mediation Board which appointed a Referee; then the docket was given the Referee for study and thereafter on the day the matter came on for oral argument carrier made its request for permission to file answer. Even then no answer was tendered or time suggested when one might be prepared. In such situation, if the Referee has such authority as urged by carrier representatives permission would be denied.

[fol. 11] We find from the record that the statements set out in claimant's submission are true; that a board of three physicians was selected by agreement of the parties for the purpose of determining claimant's physical qualification for service; that the majority of said board properly examined claimant and that their findings and decision therefrom did not support the decision of carrier's chief surgeon but that they found and decided that claimant had no physical defects which would prevent him from carrying on his usual occupation as engineer.

The issue of fact upon which the prior Award 17 646 was conditioned having been determined in favor of claimant, said conditional award should be made absolute and final and the claim sustained as therein provided.

AWARD: Claim sustained for reinstatement with pay for all time lost from October 15, 1955 pursuant to rule on the property.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **FIRST DIVISION**

ATTEST: /s/ J. M. MACLEOD
 Executive Secretary

Dated at Chicago, Illinois.
 This 8th Day of October 1958.

[fol. 12]

Form 2

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

INTERPRETATION

Award 17 646

Docket 33 531

ORDER

To: San Diego and Arizona Eastern Railway Company
 Mr. K. K. Schomp, Manager of Personnel

The carrier addressed, party to the docket identified above, is hereby ordered to make effective the award, which is attached and made a part hereof, as therein set forth and, if the award includes a requirement for the payment of money, to pay the employe (or employes) the sum to which he is (or they are) entitled on or before November 8, 1958.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **FIRST DIVISION**

ATTEST: /s/ J. M. MACLEOD
 Executive Secretary

Dated at Chicago, Illinois,
 This 8th Day of October 1958.

[fol. 13]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Civil No. 2459-SD-W
(Formerly No. 36291 Civil No. 2080-SD-W)

[Title omitted]

NOTICE OF MOTION AND MOTION FOR SUMMARY
JUDGMENT—Filed November 28, 1960

To: Hildebrand, Bills & McLeod, 1212 Broadway, Oakland 12, California; Charles W. Decker, 45 Polk Street, San Francisco 2, California, Attorneys for F. J. Gunther, Petitioner; and F. J. Gunther, Petitioner:

Please Take Notice that the San Diego & Arizona Eastern Railway Company will move the Court at the United States Custom House and Courthouse, San Diego, California, on December 14, 1960, at 2:00 P.M., or as soon thereafter as counsel can be heard, for entry of summary judgment herein in favor of San Diego & Arizona Eastern Railway Company against F. J. Gunther, together with costs and disbursements, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and in support of this motion this defendant will present the affidavit and the memorandum of points and authorities attached hereto.

Defendant San Diego & Arizona Eastern Railway Company moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter judgment for the defendant on the ground that there is no genuine issue as to any material facts in this action, and that defendant is entitled to a judgment as a matter of law, as appears from the pleadings on file in this action and the affidavit and memo-

[File endorsement omitted]

random of points and authorities attached hereto and made a part hereof.

Respectfully submitted,

Gray, Cary, Ames & Frye, James W. Archer, Eugene
L. Freeland, W. A. Gregory, William R. Denton,
By W. A. Gregory, Attorneys for Defendant.

[fol. 15] Proof of Service by Mail (omitted in printing).

[fol. 16]

ATTACHMENT TO NOTICE OF MOTION, ETC.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

(Formerly No. 36291 Civil No. 2080-SD-W)

[Title omitted]

AFFIDAVIT OF K. K. SCHOMP—Filed November 28, 1960

State of California,
City and County of San Francisco, ss.

K. K. Schomp, being first duly sworn, deposes and says:

I am a citizen of the United States and of the State of California, residing in San Francisco County; my office headquarters are at 65 Market Street, San Francisco, California.

I am Manager of Personnel of the San Diego & Arizona Eastern Railway Company and am thoroughly familiar

[File endorsement omitted]

with the collective bargaining agreement relating to the wages, rules and working conditions of its personnel. In my present position I represent the Company in negotiations with representatives of the employees, including the employees engaged in engine, train and yard service represented by the various operating brotherhoods.

[fol. 17] I make this affidavit for use in connection with the motion for summary judgment filed by defendant in this action. I am familiar with the case of Mr. F. J. Gunther, which is pending before this Court under the above-entitled number. I am also familiar with the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers. In December, 1954, when Mr. Gunther last performed active service as a locomotive engineer, the applicable printed agreement was a green colored booklet dated March 1, 1935, which was on file with the Court as Defendant's Exhibit 1 in Mr. Gunther's prior case (Civil No. 2080-SD-W). A copy of this agreement is attached as Exhibit A to this affidavit. On December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of Company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform service.

The physical examination requirements for locomotive engineers of San Diego & Arizona Eastern Railway Company at the time Mr. Gunther became seventy years of age were and still are that such employees immediately prior to the date when they reach seventy years of age must take and pass a physical examination (denominated as a re-examination) to determine their physical fitness to remain in service. A similar examination must be taken during each three-month period of service thereafter. In accordance with the foregoing requirement, Mr. Gunther reported for physical re-examination on November 24, 1953, and at each successive ninety-day interval until December

15, 1954. On the basis of the findings of Company physicians with respect to his physical condition on the latter date it was determined that he was no longer physically qualified to remain in active service as a locomotive engineer. These findings were reviewed at the Southern Pacific Hospital in San Francisco by the Chief Surgeon, who concurred in the findings and opinion that Mr. Gunther's heart was in such condition that he would be likely to suffer an acute coronary episode. Based upon this conclusion Mr. Gunther was physically disqualified, as aforesaid, on December 30, 1954.

I have examined the documents entitled Exhibits "A" and "B" to the petition in this action and find them to be true and correct copies of the documents issued by the First Division, National Railroad Adjustment Board, on the dates indicated thereon.

K. K. Schomp

Subscribed and sworn to before me this 23rd day of November, 1960.

H. G. Bunn, Jr., Notary Public in and for the City and County of San Francisco, State of California.

[fol. 19]

CLERK'S NOTE

Exhibit A to Affidavit of K. K. Schomp, "Agreement—San Diego & Arizona Eastern Railway Company and Brotherhood of Locomotive Engineers, Rules Effective March 1, 1935, Revised Rates of Pay Effective October 1, 1937" (omitted in printing).

[fol. 39]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

(Formerly No. 36291 Civil No. 2080-SD-W)

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP—
Filed December 2, 1960

State of California,
City and County of San Francisco, ss.

K. K. Schomp, being first duly sworn, deposes and says:

I am Manager of Personnel of San Diego & Arizona Eastern Railway Company and I have heretofore made an affidavit in support of defendant's motion for summary judgment in this case.

As I stated in the affidavit dated November 23, 1960, the employment of Mr. F. J. Gunther at all times material to the pending action was subject to the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers, dated March 1, 1935, as amended. On December 30, 1954, the date on which Mr. Gunther was released from active service because of the doctor's report of his physical [fol. 40] condition, the aforesaid collective bargaining agreement, including amendments thereto, contained no provision whatever relating to a three-doctor panel which could review the medical findings of the defendant's doctors with respect to the physical condition and ability of its locomotive engineers to operate its trains.

Since December 30, 1954, there had been no such agreement or amendment until the agreement signed on November 3, 1959, to become effective December 1, 1959, a copy of which is attached as Exhibit A hereto, with the exception

[File endorsement omitted]

of amendment to Article 35, Section 3(c), of the applicable agreement, effective February 1, 1957, which had no application to the circumstances involved in the employment of Mr. Gunther, and which was predicated solely upon the prior institution of legal proceedings by an employee.

I enclose as Exhibit B hereto the demand of the Brotherhood of Locomotive Engineers which culminated in Exhibit A hereto. This demand is dated August 28, 1958, and seeks the inclusion of a three-doctor panel in the existing collective bargaining agreement to which I have heretofore referred.

K. K. Schomp

Subscribed and sworn to before me this 1st day of December, 1960.

H. G. Bunn, Jr., Notary Public in and for the City and County of San Francisco, State of California.

Received a copy of the within Supplemental Affidavit this 1st day of December, 1960.

Charles W. Decker

[fol. 41]

EXHIBIT A TO SUPPLEMENTAL AFFIDAVIT BY K. K. SCHOMP

SD&AE E&F 1-1310

AGREEMENT

between

SAN DIEGO AND ARIZONA EASTERN RAILWAY COMPANY
and its engineers represented by the

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

• • • • •

It is hereby understood and agreed that Section 1, Article 35, of the agreement between the above parties, covering rates of pay, rules and working conditions, signed October 25, 1955, and which became effective January 1, 1956, is amended by adding the following thereto:

When an engineer has been removed from his position or has been restricted from performing service to which he is entitled by seniority on account of his physical fitness and desires the question of his physical ability to conform to prescribed standards to be determined before he is permanently removed or restricted, he shall be privileged to have his case handled as follows:

A special panel of doctors consisting of one doctor selected by the Company, one doctor to be selected by the employe or his representative, the two doctors to confer and if they do not agree on the physical condition of the engineer, they shall select a third doctor specializing in the disease, condition or physical ailment from which the engineer is alleged to be suffering.

Such panel of doctors shall fix a time and place for the engineer to meet with them for examination. The decision of the majority of said panel of doctors of the engineer's physical fitness to remain in service or have restrictions modified shall be controlling on both the Company and the engineer. This does not, however, preclude a reexamination at any subsequent time should the physical condition of the engineer change.

The doctors selected by the Company and the engineer or his representative shall be specialists in the disease or ailment from which the engineer is alleged to be suffering.

[fol. 41½] The Company and the engineer will be separately responsible for any expense incurred by the doctor of their choice. The Company and the engineer shall each be responsible for one-half of the fee and expense of the third member of the panel.

This agreement is effective December 1, 1959, and cancels all settlements, rulings, understandings, and practices in conflict therewith.

Signed at San Francisco, California, this 3rd day of November, 1959.

FOR THE COMPANY:

/s/ K. K. SCHOMP
Manager of Personnel

FOR THE EMPLOYEES:

/s/ J. P. COLYAR
General Chairman
Brotherhood of Locomotive Engineers

[fol. 42]

EXHIBIT B TO SUPPLEMENTAL AFFIDAVIT
OF K. K. SCHOMP

SD&AE E&F 1-1310

J. P. COLYAR
Chairman
539 Pacific Building
San Francisco 3, Calif.

GARFIELD 1-7199

GENERAL COMMITTEE OF ADJUSTMENT
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
SOUTHERN PACIFIC COMPANY (PACIFIC LINES)
FORMER EL PASO & SOUTHWESTERN SYSTEM
NORTHWESTERN PACIFIC RAILROAD COMPANY
SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY
OREGON, CALIFORNIA & EASTERN RAILWAY COMPANY
SOUTHERN PACIFIC RAILROAD COMPANY OF MEXICO

August 28, 1959

Mr. K. K. Schomp (6)
Manager of Personnel
Southern Pacific Company
San Francisco 5, California

Org. File E-20037-32-3(b) SP
24-2(b) EP&SW
35-1 SD&AE

Dear Sir:

This will serve as thirty days notice, as required by Section 6 of the Railway Labor Act, as amended and Article 36 of the agreement covering engineers on the Southern Pacific (Pacific Lines), Article 30 of the agreement covering engineers on the Former EP&SW, and Article 68 of the agreement covering engineers on the San Diego and Arizona Eastern, of the Committee's desire and intent to adopt the following as the second paragraph of Section 3(a), Article 32, SP engineers' agreement; the second paragraph

of Section 2(b), Article 24 of the former EP&SW engineers' agreement, and as the second paragraph of Section 1, Article 35 of the SD&AE engineers' agreement:

"When an engineer has been removed from his position or has been restricted from performing service to which he is entitled by seniority on account of his physical condition, and desires the question of his physical condition to be decided before he is permanently removed or restricted, he shall be privileged to have his case handled as follows:

"A special panel of doctors consisting of one doctor selected by the Company, one doctor to be selected by the employe or his representative, the two doctors to confer and if they do not agree on the physical condition of the engineer, they shall select a third doctor specializing in the disease, condition or physical ailment from which the engineer is alleged to be suffering.

"Such panel of doctors shall fix a time and place convenient to the engineer, for the engineer to meet with them for examination. The decision of the majority of said panel of doctors of the engineers physical fitness to remain in service or have restrictions [fol. 43] modified shall be controlling on both the Company and the engineer. This does not however, preclude a reexamination at any subsequent time should the physical condition of the engineer improve.

"The doctors selected by the Company and the engineer or his representative shall be a specialist in the disease or ailment from which the engineer is alleged to be suffering.

"The Company and the engineer will be separately responsible for any expense incurred by the doctor of their choice. The Company and the engineer shall each be responsible for one-half of the fee and expense of the third member of the panel."

Please advise the time and place for initial conference.

Yours truly,

/s/ J. P. COLYAR

[fol. 44]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil No. 2459-SD-W

[Title omitted]

MINUTE ORDER, JUDGE WEINBERGER'S CALENDAR,
March 27, 1961.

The defendant's motion for summary judgment as to grounds labelled I and II in its brief filed November 28, 1960, is denied. The said motion as to ground labelled III is denied without prejudice for the reasons set forth in our memorandum filed this day.

Copies to: Charles W. Decker, 45 Polk, San Francisco 2, California;

Gray, Cary, Ames & Frye, 1410 Bank of America Building, San Diego 1, California.

[fol. 45]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil No. 2459-SD-W

F. J. GUNTHER, Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a
corporation, Defendant.

MEMORANDUM OPINION—March 27, 1961.

On November 28, 1960 defendant made a Motion for Summary Judgment on the ground that "There is no genuine issue as to any material facts in this action and that de-

[File endorsement omitted]

defendant is entitled to a judgment as a matter of law."

Rule 3 (d) (2) of the Local Rules of our District provides:

"There shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure proposed findings of fact and conclusions of law and proposed summary judgment. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue.

"Any party opposing the motion may, not later than three days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

"In determining any motion for summary judgment, the [fol. 46] court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion."

The above mentioned Rule was promulgated after due consideration by the Judges of this District, and has proven to be of great assistance in the determination of motions for summary judgment and in making clear records of the contentions of the parties and the judgments of the Courts.

Counsel for the moving party did not comply with this Rule, and this Court has experienced some difficulty in determining the actual matters intended to be urged.

It appears, however, that counsel for the defendant has put forth two or three different grounds upon which the motion is based. This we gather from the brief filed in support of the motion on November 28, 1960.

At Page 6, paragraph heading "I", counsel states: "The Judgment in The Prior Action In This Court Between The Same Parties On The Same Cause Of Action Constitutes A Bar To This Action". Under such heading, Section "A" counsel states: "*An action to enforce an award of the NRAB is a trial de novo on the cause of action alleged before the*

Board. The Award itself does not create a cause of action". It is then urged that the petitioner is entitled to relief, if at all, not because he has an award and interpretation thereof, but because his rights under the collective bargaining agreement were violated when he was removed from service December 30, 1954. It is stated, "His cause of action arose from the events of that day."

Counsel then contends, under "B" at Page 8, that "*The principle of res judicata bars this action of petitioner after [fol. 47] the purported interpretation, for the issues to be decided in this action have already been raised and decided in the prior action between the same parties.*"

Under "C" at Page 10, counsel states: "*The scope of the bar of res judicata includes not only all matters which were raised in the prior proceeding but also all matters which could have been raised.*"

With the heading, "II" at Page 12, it is argued: "As the October 8, 1958, Interpretation and Order are the Same Cause of Action Presented in the Prior Case, Their Presentation at This Time to This Court is Barred by the Statute of Limitations." Under this latter section, there is quoted a portion of the Railway Labor Act (45 U. S. C. A. 153, First (q)) to the effect that all actions at law based under the provisions of the section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board.

We direct attention of counsel to our Memorandum Opinion of April 15, 1958, filed in the prior case No. 2080-SD-W, (161 F. Supp. 295). Our Findings and Conclusions in such case, filed April 8, 1959, were as follows:

"Defendant San Diego & Arizona Eastern Railway Company's motion for summary judgment having come on regularly for hearing on February 21, 1958, before the above-entitled court, Honorable Jacob Weinberger, Judge presiding, the petitioner appearing by Hildebrand, Bills & McLeod and Charles W. Decker, by Charles W. Decker, Esq., and the defendant appearing by James W. Archer, Eugene L. Freeland, Burton

Mason, W. A. Gregory and Harold S. Lentz, by James W. Archer, Esq., W. A. Gregory, Esq. and Eugene L. Freeland, Esq., and the said motion having been fully [fol. 48] argued and the court having considered the pleadings, the admissions of the parties hereto, and the affidavits on file with the said motion, and the said motion having been submitted to the court for decision, and the court having issued its MEMORANDUM OPINION AND ORDER April 15, 1958 which provided, in part, for a continuance of this cause to July 14, 1958, at which time, in the absence of any cause to the contrary shown, defendant was to be permitted to present to the Court findings of fact, conclusions of law and a judgment in accordance with said Memorandum Opinion and Order, and petitioner's motion for a stay of proceedings having been noticed and heard on July 14, 1958, and the Court having ordered a stay of the proceedings herein to February 13, 1959, and on said date having continued the defendant's motion and the presentation of findings, etc. to March 6, 1959, and the said parties by the said attorneys having appeared on said date and said motion having been again fully argued and the court being fully advised in the premises, the court now makes its findings of fact, conclusions of law and order for summary judgment as follows, to wit:

FINDINGS OF FACT

It appears to the court that material facts which exist herein without substantial controversy are:

1. Defendant at all times pertinent to this action was, and now is, a corporation organized and existing pursuant to the laws of the State of Nevada, and was and now is a carrier by railroad subject to the Interstate Commerce Act.

[fol. 49] 2. Petitioner was employed by defendant on December 18, 1916, as a fireman and was promoted to locomotive engineer on December 4, 1923, and was so employed by defendant until December 30, 1954.

3. On December 30, 1954 the terms of petitioner's employment with defendant were governed by the agreement by and between San Diego & Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers and the said agreement established the rights, duties and relationship of the parties hereto.

4. On December 30, 1954, defendant removed petitioner from active service as a locomotive engineer on the ground that he was no longer physically qualified to remain in active service as a locomotive engineer.

5. On November 18, 1955 petitioner submitted his claim for reinstatement to the service of defendant with compensation for time lost by reason of said removal from service to the National Railroad Adjustment Board, First Division, and said claim was assigned Docket No. 33-531 by said Board. Thereafter, on October 2, 1956 said Board made its findings upon said claim, and issued its order.

6. The findings of said Board provided in part as follows:

'Since determination of the facts necessary to enable the Division to make proper award on such issue requires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three [fol. 50] qualified physicians, one chosen by carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians. (Emphasis supplied)

While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses

sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians.

If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians.

AWARD: Claim disposed of per Findings.'

The Order provides as follows:

'The carrier addressed, party to the docket identified above, is hereby ordered to make effective the award, which is attached and made a part hereof, as therein set forth and, if the award includes a requirement for [fol. 51] the payment of money, to pay the employee (or employes) the sum to which he is (or they are) entitled on or before November 2, 1956.'

7. Pursuant to such findings and order, the carrier appointed a physician, the petitioner appointed a physician and the two so appointed selected a third physician, comprising a board of physicians. The reports of such physicians have been made of record in this case.

8. The defendant has refused to return petitioner to active service or to pay him back wages.

CONCLUSIONS OF LAW

The Court concludes:

1. The Court has jurisdiction of the subject matter of this action and of the parties hereto.

2. It is not necessary or proper for the purpose of deciding this motion for summary judgment that the Court consider whether the National Railroad Adjust-

ment Board had jurisdiction to order the appointment of a board of physicians to examine petitioner.

3. It is not necessary or proper for the purpose of deciding this motion for summary judgment that the Court consider the terms of the agreement between the defendant and the Brotherhood of Locomotive Engineers mentioned in Paragraph 3 of the findings herein.

4. There is no genuine issue as to any material fact and the admitted facts show that the National Railroad Adjustment Board, had not, as of the date of filing the petition herein, made any award and order pursuant thereto with which the carrier defendant has not complied.

5. The defendant is entitled to judgment herein and to its costs."

[fol. 52] We do not agree with defendant that the statute has run as against the petitioner. The latter was seeking reinstatement, and he had no recourse to our court until the National Railroad Adjustment Board had issued an order with which the railroad had refused to comply. See *Slocum v. Delaware*, 339 U. S. 239. Such a situation did not exist under the facts and order presented in the first action. This Court expressly did not adjudicate the rights of the parties under the collective bargaining agreement; such an adjudication is expressly sought in the present action.

Counsel for the moving party contends that because the second order of the Board and the refusal of the railroad to comply with it were not brought into the first action by a supplemental petition that petitioner is barred from bringing the present action. Again we point out that the Court expressly found it not necessary in the first action to adjudicate the merits of the controversy over the terms of the bargaining agreement.

We do not agree that the Judgment in the first action is res judicata of this, the second action which is before us now.

Under heading "III" of its brief at Page 14, the Railroad urges that the petitioner cannot rely upon any decision of the National Railroad Adjustment Board unless there is some provision in the contract between the Union and the railroad limiting the right of the defendant to remove its engineers from active service when it finds that they are no longer physically qualified for such service. Defendant urges that no such provision is found in the contract, and wishes us to so interpret the agreement and grant the motion for summary judgment. At the same time, defendant has filed an affidavit wherein it has been stated [fol. 53] that a "practice" of the railroad existed with reference to retirement after a certain age. Petitioner has not filed a counter-affidavit. If evidence along this line has any bearing on the issues, and there are cases which refer to a "practice" or "plan" of compulsory retirement, then this Court should have more information regarding the same, for instance, the period during which it existed. If a "practice" or "plan" has no bearing, then the affidavit mentioning the same should not be made a part of the record. We have reviewed a few cases, not cited by counsel, which deal with the subject just mentioned, and no doubt counsel for the parties, as experts in this field of law, will be able to cite other cases. (See: *United Protective Workers of America v. Ford Motor Co.*, 194 F. 2d 997, *United Protective Workers v. Ford*, 223 F. 2d 49, *United Steel Corporation v. Nichols*, 229 F. 2d 396.)

Counsel for petitioner contends that the latter should not be deprived of his day in court by the granting of a motion for summary judgment. He argues that the absence of a specific contractual provision limiting defendant's right to determine the physical fitness of its employees does not compel the Court to infer that such a limitation *does not* exist. Counsel for petitioner also says that the entire contract should be construed, but that the contract is not now before the Court.

In the affidavit of K. K. Schomp, filed by the defendant on November 28, 1960, it is stated that a copy of the Agreement in effect as of December, 1954, (when Mr. Gunther last performed active service for the defendant) is attached

to the affidavit as Exhibit "A". If counsel for the petitioner denies that Exhibit "A" of said affidavit, as the same appears in the Clerk's file, is not the contract in controversy, then there is, of course, need for clarification.

[fol. 54] Counsel for the petitioner likewise hints that the contract is ambiguous and that a limitation upon the right which the defendant claims might be found in the contract in the light of parol evidence admitted as an aid in interpreting it. Counsel for the petitioner, however, has filed no affidavit to show what parol evidence he deems important, nor, for that matter has he pointed out in what particulars the contract may be ambiguous.

Summary judgment is an extreme remedy and should be awarded only when the facts are quite clear. (Kennedy v. Bennett, 261 F. 2d 20, Traylor v. Black, etc., 189 F. 2d 213.) Any doubt as to whether the motion should be granted must be resolved against the movant. (Booth v. Barber Transp. Co., 256 F. 2d 927.) The function of a summary judgment is to eliminate sham issues (Irving Trust Co. v. U. S., 221 F. 2d 303).

It is our view that while petitioner waited nearly two years after the award of October 8, 1958 and the defendant's refusal to comply therewith before coming to this Court, the outcome of this litigation is of extreme importance to petitioner because of the large amount of money claimed as back wages and of possible importance to his Union because of principles of collective bargaining involved. In Kennedy v. Silas Mason Company, the Supreme Court, in the reported opinion (334 U. S. 249) observed at page 256:

" . . . The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.

[fol. 55] "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.

"We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. . . ."

We think this controversy should be decided as soon as possible, but on a record which will disclose clearly the matters this Court is to consider. If both counsel are of the view that an interpretation of the collective bargaining contract on its face will decide Mr. Gunther's rights, let them so state. If other matters are to be passed upon, let them be presented in proper form.

We believe that the motion for summary judgment should be denied as to ground I and II for the reasons we have stated. It is our further view that the motion should be denied, without prejudice, as to ground III. A minute order based upon this memorandum will be filed as of this date.

Dated this 27th day of March, 1961.

Jacob Weinberg, U. S. District Judge.

[fol. 56]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459-SD-W

(Formerly No. 36291—Civil No. 2080-SD-W)

[Title omitted]

ANSWER—Filed April 24, 1961

Comes now the defendant in the above-entitled action and, answering the petition herein, admits, denies and alleges as follows:

I.

Admits that this action was brought pursuant to 45 U.S.C.A. 153(p) and that this Court has jurisdiction over such an action.

II.

Defendant admits the allegations of paragraph II of the petition.

III.

Answering paragraph III of the petition, defendant admits that petitioner was employed by defendant on December 18, 1916, as a fireman; that on December 4, 1923, [fol. 57] he was promoted to locomotive engineer, which seniority date he had, in accordance with the applicable collective bargaining agreement, at the times mentioned in the petition. Defendant denies each and all of the other allegations contained in paragraph III.

IV.

Answering paragraph IV, defendant admits that petitioner's employment with defendant was subject to the terms of a collective bargaining agreement by and between

[File endorsement omitted]

the San Diego & Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers; and defendant admits that there is no provision in said agreement relating to the age at which employees covered thereby should retire from active service. Defendant denies each and all of the other allegations contained in paragraph IV.

V.

Answering paragraph V, defendant admits that on December 30, 1954, it removed petitioner from active service as a locomotive engineer upon advice of the Chief Surgeon that petitioner had been physically disqualified from performing such service after physical examination. Defendant denies each and all of the other allegations contained in paragraph V.

VI.

Answering paragraph VI, defendant admits that following petitioner's disqualification from performing service as a locomotive engineer upon physical examination, as set forth in paragraph V, petitioner presented his claim for reinstatement to active service to defendant, with compensation for time lost by reason of said removal from service and, upon denial thereof, said claim was submitted to the First Division, National Railroad Adjustment Board, and said claim was assigned Docket No. 33531 by said Board; that thereafter on October 2, 1956, said Board [fol. 58] issued its purported decision under Award No. 33531, and its purported Order under the same award and docket numbers, copies of which are attached as Exhibit A to the petition. Defendant denies each and all of the other allegations contained in paragraph VI.

VII.

Answering paragraph VII, defendant admits that following the issuance by the First Division, National Railroad Adjustment Board, of said purported Decision and Order under Award No. 17646, Docket No. 33531, a board of three

physicians therein provided for was selected; alleges that the decision of said Board supported the decision of defendant's examining physicians and Chief Surgeon; and admits that thereafter defendant again refused to reinstate petitioner to active service. Defendant denies each and all of the other allegations contained in said paragraph VII.

VIII.

Answering paragraph VIII, defendant alleges that on March 22, 1957, petitioner filed "Petition to Enforce Award and Order of National Railroad Adjustment Board" in this Court under Civil No. 2080-SD-W; and that on April 15, 1958, at petitioner's request, this Court continued the cause to give petitioner an opportunity to request said First Division to review and interpret its said Award No. 17646 of October 2, 1956. Defendant admits that thereafter in June, 1958, petitioner forwarded to the First Division, National Railroad Adjustment Board, a document entitled "Ex Parte Submission From the Brotherhood of Locomotive Firemen and Enginemen vs. San Diego & Arizona Eastern Railway Company", asking said Board to render an interpretation of said purported award of October 2, 1956; and that on October 8, 1958, said Board issued two documents respectively entitled "Interpretation" and "Order", copies of which are attached as Exhibit B to the petition. Defendant denies each and all of the other allegations contained in paragraph VIII.

[fol. 59]

IX.

Answering paragraph IX, defendant admits that following the issuance of the purported "Interpretation" and "Order" dated October 8, 1958, as set forth in paragraph VIII above, petitioner made demand upon defendant to comply with the terms thereof; that defendant refused to comply with said demand and suggested to petitioner that he should present Exhibit "B" to the petition to the Court in accordance with his motion for stay of proceedings in this Court in Civil No. 2080-SD-W, on July 14, 1958, which the Court had granted until Monday, February 16, 1959,

in order to enable petitioner to obtain from the National Railroad Adjustment Board, First Division, an interpretation of the Award and Order sued upon; and defendant alleges that notwithstanding the said action of this Court and the suggestion of this defendant and the representations by petitioner in a document filed in said action, petitioner, for reasons best known to him, failed and refused to make the said purported Interpretation and Order a part of Civil Action No. 2080-SD-W; that on April 8, 1959, this Court rendered judgment in favor of this defendant and against this petitioner, which said judgment has become final; and defendant admits that it has refused to comply with the provisions of said purported "interpretation" and "Order" of October 8, 1958, upon each and all of the grounds referred to in this Answer, including the lack of jurisdiction of the First Division, National Railroad Adjustment Board, the fact that in any event the Award is favorable to defendant and cannot be changed under the guise of interpretation, the constitutional and statutory defects in the procedure employed in connection therewith and the unwarranted attempt to interfere with defendant's efforts to provide safe transportation service to the public. Defendant denies each and all of the other allegations of paragraph IX.

[fol. 60]

X.

Defendant denies each and all of the allegations of said paragraph X and denies, in particular, that petitioner has been damaged or suffered any loss of wages in any sum or amount whatsoever.

XI.

Except as specifically admitted herein, defendant denies each and every other allegation contained in the petition.

First Separate Defense

For A First, Further And Separate Defense to said petition, defendant alleges and shows:

The petition fails to state a claim against defendant upon which relief can be granted.

Second Separate Defense

For A Second, Further And Separate Defense to said petition, defendant alleges and shows:

The petition herein relates solely to matters which have been adjudicated by this Court between the same parties and must be deemed to be finally and conclusively settled. Defendant alleges that the petition herein is barred by the doctrine of res judicata.

Third Separate Defense

For A Third, Further And Separate Defense to said petition, defendant alleges and shows:

The right of action set forth in the petition did not accrue within two years next before the commencement of this action. The right of action is barred by the applicable federal and state statutes of limitation.

Fourth Separate Defense

For A Fourth, Further And Separate Defense to said petition, defendant alleges and shows:

The purported Award, Interpretation and Order attached as Exhibits A and B to the petition are invalid, [fol. 61] void and unenforceable because each and all of them were purportedly rendered by the First Division, National Railroad Adjustment Board, which was without and in excess of its jurisdiction in connection therewith.

Fifth Separate Defense

For A Fifth, Further And Separate Defense to said petition, defendant alleges and shows:

The purported "Interpretation" and "Order" of October 8, 1958, attached as Exhibit B to the petition herein, are wholly void, invalid and unenforceable in that they were purportedly rendered by the First Division, National Rail-

road Adjustment Board, in a decision in which defendant had no notice or opportunity to be heard or represented at any stage thereof; and further that the purported action of the First Division, National Railroad Adjustment Board, in Exhibit B to the petition herein was not authorized or permitted by the Railway Labor Act and is further in violation of the 5th and 14th Amendments to the Constitution of the United States.

Sixth Separate Defense

For A Sixth, Further And Separate Defense to said petition, defendant alleges and shows:

The petition fails to show a claim against defendant within the jurisdiction of this Court.

Seventh Separate Defense

For A Seventh, Further And Separate Defense to said petition, defendant alleges and shows:

The petitioner has delayed filing the within action for an unreasonable length of time, to-wit, from and since October 8, 1958, although no new or different facts have developed and the within cause of action is barred by the doctrine of laches.

Wherefore, defendant San Diego & Arizona Eastern Railway Company, a corporation, prays that petitioner take nothing by his petition on file herein and that defendant have judgment and its costs of suit incurred herein and such other, further and different relief as may be proper in the premises.

A trial by jury is demanded in this action.

Gray, Cary, Ames & Frye, James W. Archer,
Eugene L. Freeland, W. A. Gregory, William R.
Denton, By W. A. Gregory, Attorneys for Defendant.

Dated: April 20, 1961.

[fol. 63] *Duly sworn to by K. K. Schomp, jurat omitted in printing.*

[fol. 64] Proofs of Service by Mail—omitted in printing.

[fol. 66]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Civil No. 2459-SD-W

[Title omitted]

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT
—Filed May 16, 1961

To: Hildebrand, Bills & McLeod, 1212 Broadway, Oakland 12, California; Charles W. Decker, 45 Polk Street, San Francisco 2, California; Gostin and Katz and Irwin Gostin and Louis S. Katz, Suite 725, U.S. Grant Hotel, 326 Broadway, San Diego 1, California, Attorneys for F. J. Gunther, Petitioner; and F. J. Gunther, Petitioner:

Please Take Notice that the San Diego & Arizona Eastern Railway Company will move the Court at the United States Custom House and Courthouse, San Diego, California, on Monday, May 29, 1961, at 2:00 P.M., or as soon thereafter as counsel can be heard, for entry of summary judgment herein in favor of San Diego & Arizona Eastern Railway [fol. 67] Company against F. J. Gunther, together with costs and disbursements, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and in support of this motion this defendant will present the affidavit and the memorandum of points and authorities attached hereto.

Defendant San Diego & Arizona Eastern Railway Company moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter judgment for the defendant on the ground that there is no genuine issue as to any

[File endorsement omitted]

material facts in this action, and that defendant is entitled to a judgment as a matter of law, as appears from the pleadings on file in this action and the affidavit and memorandum of points and authorities attached hereto and made a part hereof.

Respectfully submitted,

Gray, Cary, Ames & Frye, James W. Archer, Eugene
L. Freeland, W. A. Gregory, William B. Denton,
By W. A. Gregory, Attorneys for Defendant.

[fol. 68] Proof of Service by Mail (omitted in printing).

[fol. 69]

ATTACHMENT TO NOTICE OF MOTION, ETC.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil No. 2459-SD-W

[Title omitted]

AFFIDAVIT OF K. K. SCHOMP—Filed May 16, 1961

State of California,
City and County of San Francisco, ss.:

K. K. Schomp, being first duly sworn, deposes and says:

I am a citizen of the United States and of the State of California, residing in San Francisco County; my office headquarters are at 65 Market Street, San Francisco, California.

I am Manager of Personnel of the San Diego & Arizona Eastern Railway Company and am thoroughly familiar with the collective bargaining agreement relating to the

[File endorsement omitted]

wages, rules and working conditions of its personnel. In my present position I represent the Company in negotiations with representatives of the employees, including the employees engaged in engine, train and yard service rep-[fol. 70] resented by the various operating brotherhoods.

I make this affidavit for use in connection with the motion for summary judgment filed by defendant in this action. I am familiar with the case of Mr. F. J. Gunther, which is pending before this Court under the above-entitled number. I am also familiar with the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers. In December, 1954, when Mr. Gunther last performed active service as a locomotive engineer, the applicable printed agreement was a green colored booklet dated March 1, 1935, which was on file with the Court as Defendant's Exhibit 1 in Mr. Gunther's prior case (Civil No. 2080-SD-W). A copy of this agreement has heretofore been filed with the Court in this case and copies have been distributed to petitioner's counsel and it is referred to herein as Exhibit "A" to this affidavit. On December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of Company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform service.

Locomotive engineers employed by the San Diego & Arizona Eastern Railway Company are and have always been required to take and pass periodic physical examinations and reexaminations to determine their fitness to remain in service. In the year 1954 these requirements provided, and they still provide, that employees of age seventy and over must take and pass such a physical examination every three months. In accordance with the foregoing rule, Mr. Gunther reported for physical examination on November 24, 1953, and for additional examinations (reexaminations) in each successive three-month period to and including December 15, 1954. On the latter date Mr. Gunther

reported for and took his physical examination; and on [fol. 71] the basis of the findings during this examination the examining physicians determined that he was no longer physically qualified to remain in service as a locomotive engineer. These findings were reviewed at the Southern Pacific Hospital in San Francisco by the Chief Surgeon, who concurred in the findings and opinion that Mr. Gunther's heart was in such condition that he would be likely to suffer an acute coronary episode. Based upon this conclusion Mr. Gunther was physically disqualified, as aforesaid, on December 30, 1954.

I have examined the documents entitled Exhibits "A" and "B" to the petition in this action and find them to be true and correct copies of the documents issued by the First Division, National Railroad Adjustment Board, on the dates indicated thereon.

The defendant has published, throughout the years, a number of rules concerning its operations, the conduct and safety of its employees, physical examinations and standards and other subjects. Many of these rules are contained in the defendant's "Rules and Regulations of the Transportation Department", which booklet is attached as Exhibit "B". These rules must be complied with by the employees and are not a part of the collective bargaining agreement. The same is true of the rules relating to physical examinations required of operating employees, which I have described heretofore in connection with Mr. Gunther, and which require that all locomotive engineers in each category must take and pass periodic physical examinations in order to continue in active service.

Prior to and since December 30, 1954, the collective bargaining agreement attached as Exhibit "A" has been the contract governing the employment of Mr. Gunther. Until December 1, 1959, this contract contained no provision creating a three-doctor panel to review the physical condition of a locomotive engineer who has been removed from his position or restricted from performing service for this [fol. 72] reason on advice of the Company's physicians, nor for any other review of the decisions of the Company's

physicians on the subject. This fact was recognized by a demand served upon the defendant company under date of August 28, 1959, by the Brotherhood of Locomotive Engineers through its General Chairman, Mr. J. P. Colyar. Mr. Colyar has at all material times represented the locomotive engineers employed by defendant for collective bargaining purposes. A copy of Mr. Colyar's demand is attached, together with the amending agreement of December 1, 1959, as Exhibit "C".

Prior to December 1, 1959, the effective date of Exhibit "C", locomotive engineers disqualified upon advice of the company physicians for physical reasons were either permitted to work on a restricted basis or removed entirely from active service in accordance with the recommendations of the doctors. In Mr. Gunther's case the recommendation was that he should not be returned to duty. Accordingly the defendant took the within action. This is still the procedure followed by defendant subject to the terms of Exhibit "C".

Attached as Exhibit "D" is Decision No. 2860 in Case No. 2-ORC&B (Condr-Train) Supplemental List No. 11 of Special Adjustment Board No. 18 (Train and Yard Service Panel) dated July 22, 1959, in a case involving Southern Pacific Company in which the collective bargaining agreement was the same as Exhibit "A" insofar as it related to removal from service for physical disqualification. The agreement likewise did not contain any provision for a three-doctor panel.

K. K. Schomp

Subscribed and sworn to before me this 11th day of May, 1961.

H. G. Dunn, Jr., Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires June 25, 1963.

[fol. 72½]

CLERK'S NOTE:

Exhibit B to Affidavit of K. K. Schomp, "San Diego & Arizona Eastern Railway Company—Rules and Regulations of the Transportation Department, Effective July 1, 1960" (omitted in printing).

[fol. 73]

CLERK'S NOTE:

Exhibit C to Affidavit of K. K. Schomp, "Letter from J. P. Colyar, Chairman, Brotherhood of Locomotive Engineers to Mr. K. K. Schomp, dated August 28, 1959 and Agreement between San Diego and Arizona Eastern Railway Company and its Engineers represented by the Brotherhood of Locomotive Engineers signed on November 3, 1959 are omitted from the record here as they appear on pages 17-21 supra."

[fol. 77]

EXHIBIT D TO AFFIDAVIT OF K. K. SCHOMP

Org. file 313-M-14 (56) DECISION No. 2860
 Co. file 011-122-2 (L) CASE No. 2-ORC&B (Condr-Train)
 Supplemental List No. 11

SPECIAL ADJUSTMENT BOARD No. 18

(Train and Yard Service Panel)

PARTIES TO DISPUTE: Order of Railway Conductors and
 Brakemen
 Southern Pacific Company
 (Pacific Lines)

STATEMENT OF CLAIM: Claim of Brakeman O. F. Lemon, Tucson-Rio Grande Division, for the amount he would have earned, March 22, 1958, and subsequent thereto, had he been permitted to displace Brakeman T. E. Massey on Run 272, as requested.

STATEMENT OF FACTS: Oswell Farmer Lemon was employed as a student yardman on the Tucson Division on January

5, 1941, and was promoted to a yardman on February 5, 1941. On August 29, 1947, he exchanged seniority rights with a Tucson Division brakeman and thereafter performed service as such and on April 4, 1951, he was promoted to conductor.

While claimant Lemon was in his hotel at Lordsburg on August 19, 1956, his away-from-home terminal, he suffered an attack described as a convulsive seizure, which was witnessed by Dr. H. S. Cohen, a Southern Pacific Company Hospital Department physician, and other employes of the carrier. When claimant regained consciousness, he admitted to the doctor that he had previously suffered a similar seizure and that his doctor in Tucson had diagnosed his affliction as epilepsy. He further stated that his attack had occurred because he had run out of pills that he had been taking for epilepsy. When carrier's Chief Surgeon learned of claimant's condition through Dr. Cohen at Lordsburg, he sent a telegram to carrier's Division Superintendent at Tucson on August 28, 1956, as follows:

"O. F. Lemon, brakeman-conductor recently under care of Dr. Cohen should not be returned to duty until authorized by this office. W-16."

whereupon the claimant was withheld from service and referred to the General Hospital at San Francisco for examination and observation.

On September 1, 1956, the claimant was admitted to carrier's General Hospital at San Francisco for investigation of grand mal seizures, where he remained until December 6, 1956. Report was received from Dr. Harriet S. Baritell at Tucson (physician selected by claimant), dated September 12, 1956, addressed to Dr. J. J. McGinnis of the Hospital Department giving medical history of the case, including the convulsive seizures, all of which was readily admitted by the claimant and his physician. Prior to leaving the General Hospital at San Francisco on December 6, 1956, the claimant refused further studies of his physical condition and he was not released for duty.

On February 20, 1957, claimant returned to the General Hospital at San Francisco where he remained through [fol. 78] March 18, 1957. When the claimant was discharged from the General Hospital on March 18, 1957, he was not issued a return-to-duty certificate because, as set forth in detail in carrier's submission, the findings of medical examinations developed claimant's physical condition disqualified him for the safe performance of his duties as a trainman.

The claimant has not performed service since August 28, 1956, and has been and presently is being carried on sick leave without being permitted to return to duty as a result of his physical condition, which carrier contends disqualified him for the safe performance of his duties as a trainman.

DECISION: This claim is based upon the contention that claimant Lemon was qualified for service with carrier on March 22, 1958, and subsequent thereto, and that he was originally withheld from service as a brakeman on the assumption he was not qualified because of health reasons. Claimant was disqualified for train service by the Chief Surgeon because of convulsive seizures. The evidence presented by the hospital authorities, together with their findings, clearly establish a case of disqualification, if we are to base our holding upon the findings of the hospital authorities, as we are to do, all as is hereinafter shown.

Petitioner contends claimant has been able at all times since March 22, 1958, to perform train service and that the medical authorities at the General Hospital erred in their findings of disability. Petitioner offers proof of this contention by statements of outside and independent doctors who support claimant's contention that he is and has been at all times pertinent to this dispute fully able to perform the service from which he was removed. Because of this conflict as between findings and opinions of the Southern Pacific Hospital authorities, including the Chief Surgeon, and these outside independent doctors petitioner asked for this Board to authorize a medical panel, to include outside

physicians, to examine claimant and that their findings in regard to his health condition be used in finally determining claimant's fitness to return to service as a brakeman.

The Board feels that it is entirely without authority to grant such a request. Absent an agreement between parties that such a panel might be, in such circumstances as these, set up and given authority to determine an employee's fitness for service we find no legal way it can be done.

We are not unaware of the fact that the First Division of the NRAB has, in some cases, sustained the contention of employees that it has a right to set up such a medical panel even in circumstances where the agreement between carrier and employees contains no authority therefor. There is also authority for denying requests to go outside the rules of agreement to set up functions generally. This, in [fol. 79] our opinion, is a matter that should be properly left for negotiation between carrier and its employees, if such an arrangement is to be deemed desirable. We do know that the general principle of recognizing in carrier the clear right to establish certain physical standards that all employees must meet is well established. See First Division Awards 16464, 16484, and Third Division Awards 728 and 2886 for examples.

The carrier's liability for the safe operation of its transportation facilities makes it responsible for the fitness of the employees to hold their respective positions. The carrier owes a duty to its patrons, as well as those engaged in the operation of the railroad, to exclude the unfit from its service. Moreover, the carrier has the right to establish certain reasonable physical standards that all employees must meet. This is not to say that employees do not also have a right, by virtue of their contract with carrier, to have any determination of unfitness for service based upon reasonable proof of unfitness. However, under the agreement between the parties as it is now written the hospital authorities make the final determination as to fitness for service.

When the Board requires the determination of an employee's physical fitness by the findings of a three-doctor

panel, as petitioner contends for, it is, in effect, making a new rule, which this Board is not authorized to do.

In an early award on the First Division (Award 3323) Referee Swacker pointed out that the First Division was not qualified and could not undertake to pass on the ability of an employe to meet operating rules' qualifications. This is, of course, the general tenor of all expressions on the subject on the First, and other, Divisions of NRAB.

The hazard involved in permitting employes to continue in service, when they have been found to be physically disqualified for the safe performance of their work, is clearly recognized. This involves not alone the safety of the employe himself, but the safety of his fellow employes and the public. The carrier not alone has the *right* to withhold such employes from service, but has the *duty* and *responsibility* to do so. This matter has been passed upon many times by the National Railroad Adjustment Board; some of the awards rendered by that and other tribunals being as follows:

First Division Award 12265, Referee O'Malley:

"... within good faith the carrier unquestionably is justified in removing from service a man whom its physicians regard as physically incapacitated."

First Division Award 12730, Referee Thaxter:

"The Carrier was fully justified in not returning this man to duty until it appeared that he could perform his work with due regard for the safety of the travelling public."

[fol. 80] *First Division Award 15181, Referee Coffey:*

"... the carrier acted only as reasonably prudent management would be expected to act, under the same or similar circumstances, and is not to be penalized on a record which shows it exercised its best judgment."

First Division Award 16484, Referee Scott:

"... the benefit of any reasonable doubt over the physical condition of a . . . employe must be given the carrier.

* * *

"... the carrier acted within its rights in determining that the claimant was disqualified for further service because of his impaired physical condition and in removing him from service for that reason . . ."

The carrier's position with respect to its right to select its own medical advisers, and to act on the basis of such competent medical advice, is sustained by Board awards as follows:

First Division Award 17458, Referee Stone:

"... within reason a carrier must have the right to select its own medical advisers . . ."

First Division Award 16966, Referee Ferguson:

"... His removal from service was only after complete medical investigation and on the basis of competent medical advice."

The claim for time lost was denied.

First Division Award 17135, Referee Rogers:

"... That there is ample evidence in the record to support Dr. Cunningham's [examining surgeon for the carrier] conclusion there is no doubt.

"In the absence of arbitrary, capricious or prejudicial action by Dr. Cunningham, we are not warranted in reversing his opinion. He was authorized and qualified to weigh the evidence and reach a professional, factual conclusion for the carrier. We are not. It is not our prerogative to weigh the facts on either side for the purpose of making a finding of our own."

[fol. 81] *Special Adjustment Board 180, Decision 154:*

"The Chief Surgeon in making his findings as to an employe's fitness for service is not to be bound by the findings, diagnosis or prognosis of any outside or personal physician of the employee . . .

"The matter of whether an employe is or is not fit for service is to be determined solely by the findings of the hospital authorities . . ."

Third Division Award 2491, Referee Carter:

"It must be borne in mind that the carrier is primarily charged with the efficient and safe operation of its railroad. In its managerial capacity, it is charged with the selection of competent employes. Except where it has limited itself by contract, the right of selection is wholly within the discretion of the management . . ."

Special Adjustment Board 180, Decision 155:

"We cannot dispute the correctness of the hospital authorities' findings which show that claimant was properly withheld from service and subsequently restricted in the performance of his duties at all times in question.

" . . . when the hospital authorities themselves determined that claimant was not physically or mentally fit for service or, that he could properly perform service only of a restricted type, this Board's inquiry must end . . ."

The courts have often stated that a Board, such as this, like the courts, cannot write a contract for the parties. Nor can this be accomplished indirectly under the guise of "interpretation and application" of agreements within the jurisdiction conferred upon the Board by the Railway Labor Act. The court in *Thomas v. New York, Chi. & St. L. R.R.*, 185 F. 2d 614, 617 (6th Cir. 1950), stated in part as follows:

"While the Board under the Statute has jurisdiction to hear an individual grievance, it is not authorized to write a contract for the parties nor to create substantive legal rights."

In *Hunter v. Atchison T. & S.F. Ry.*, 171 F. 2d 594 (7th Cir. 1948), the court denied enforcement of a Board award, stating at page 599:

"In reality, what the Board did was not merely to exercise its statutory authority to interpret and apply the contract as it existed but to make a new contract be-[fols. 82-83] tween the brakemen and the carrier. We think the five members of the Board who dissented from the Award properly characterized the action of the majority when they stated in their dissenting opinion: 'The lesson of the award is that contracts may be altered, changed, or amended, in plain violation of the Railway Labor Act, merely by the assertion of a claim which has no foundation for support in the agreement.' That these are the correct conclusions to be drawn from the wanton usurpation of power by the majority which voted for the award, is adequately fortified by the undisputed facts of record which were before us."

This principle was also applied in *Southern Pacific Company v. Joint Council Dining Car Employees*, 165 F. 2d 26 (9th Cir. 1947) cert. den. 68 S. Ct. 608 (1948). At page 28 the court said:

"It [the Board] held that it would do no more than determine whether the furnishing of the meals was a part of the contract and leave to the courts the effect on the contract of Section 3(m) of the Act, stating 'From its inception this Board has consistently held that its functions are limited to interpreting and applying the rules agreed upon by the parties.'"

We will not undertake to review the evidence and findings going to claimant's unfitness for service beyond pointing out that such unfitness is amply supported by the findings of four doctors, all of whom are in agreement that he *has* suffered convulsive seizures, which, under the policy of the carrier, disqualifies him for service as a trainman. The disagreement as between the hospital doctors and claimant's outside physicians goes to the question of whether or not he now suffers from such seizures and should have been disqualified from service subsequent to March 21, 1958.

Since we cannot agree with petitioner's contention either that claimant was improperly withheld from service by carrier, or that we are authorized to, and should, set up a medical panel independent of the regular hospital authorities to determine his fitness for service, the claim must be denied.

The claim is denied.

/s/ THOMAS J. MABRY/mb
Thomas J. Mabry, Chairman and
Neutral Member

/s/ GEO. P. LECHNER
G. P. Lechner, Employe Member

/s/ J. J. CORCORAN
J. J. Corcoran, Employe Member

/s/ J. A. MCKINNON
J. A. McKinnon, Carrier Member

/s/ H. A. TEAL
H. A. Teal, Carrier Member

San Francisco, California
July 22, 1959.

[fol. 99]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459 SD-W

[Title omitted]

PETITIONER F. J. GUNTHER'S AFFIDAVIT IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT—Filed May 29, 1961

State of California,
County of San Diego, ss.:

F. J. Gunther, being duly sworn, deposes and says:

That he is petitioner in the above entitled matter; that he makes this affidavit to be submitted to the Court in opposition to defendant's motion for summary judgment herein; that he has personal knowledge of the facts herein stated and, if called as a witness, he could and would testify to same; that for many years he was General Chairman of the Brotherhood of Locomotive Firemen and Enginemen and, as such, actively engaged in enforcing the provisions of the Agreement referred to in his petition herein and, additionally, employed as a locomotive engineer by the defendant herein; that he is thoroughly familiar with said Agreement and its interpretation and application by the parties thereto in the operations of defendant.

That, with respect to petitioner's right to continued employment, said Agreement adopts the principle of seniority and provides:

"Article 35—Seniority

Section 1

Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as an engineer.

[File endorsement omitted]

Section 3 (b)

Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment."

That said Agreement also adopts the principle of discharge only for good cause and states:

"Article 47—Investigations

Section 1 (b)

No engineer shall be suspended or discharged, except in serious cases, where a fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials.

Section 1 (e)

If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid rate as set forth in Appendix 'B' for time lost on such account."

That, further, with respect to reduction in force, said Agreement provides:

"Article 38—Reduction of force

Section 1 (a)

When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off may, if they so elect, displace any fireman their junior under the following conditions:

* * * * *

Second: That when reductions are made they shall be in reverse order of seniority."

That said provisions are vague, ambiguous and insufficiently certain to specify, in and of themselves, the precise rights of the employees covered thereby with respect to duration of employment and the rights, if any, of the employer to restrict same.

That at all times pertinent herein the interpretation of [fols. 101-102] said provisions, and their application to defendant's operations, were done by reference to a long history of custom and practice in the railroad industry; that, for example, because the "... (R)ights of engineers ... governed by seniority in the service of the Company ..." were not specified in detail in said Agreement, their substance could only be, and was, determined by resort to custom and practice in the industry.

That at all times pertinent herein it was the custom and practice for engineers covered by said Agreement to bid for and retain assignments to active duty on the basis of seniority; that, therefore, the most senior engineer was entitled to the assignment of his preference and, in the event of elimination of such assignment by reduction of work force or otherwise, such senior engineer had the right to displace a junior and thus continue in active employment; that defendant's removal of petitioner from the assignment of his choice on December 30, 1954 was in violation of petitioner's seniority rights as conferred by said Agreement because, at said time, petitioner was senior to the engineer who replaced him on said assignment and, for that matter, to all other engineers in the employ of defendant.

That at all said times it was never the custom and practice for the active employment of an engineer covered by said Agreement to be terminated by retirement against the will of such engineer.

Dated: May 26, 1961.

F. J. Gunther

Subscribed and sworn to before me this 29 day of May, 1961.

Margit Nellaway, Notary Public, In and for the County of San Diego, State of California.

Margit Nellaway, My Commission Expires Oct. 1, 1963.

[fol. 104]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459-SD-W

F. J. GUNTHER, Petitioner,

v.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY,
a corporation, Defendant.

Appearances

Counsel for Petitioner:

Charles W. Decker, 45 Polk, San Francisco 2, California;
Gostin & Katz, 725 U. S. Grant Hotel, San Diego 1,
California;

Clifton Hildebrand, Hildebrand, Bills & McLeod, 1212
Broadway, Oakland 12, California.

Counsel for Defendant:

Gray, Cary, Ames & Frye, James W. Archer, Eugene
L. Freeland, 1410 Bank of America Building, San Diego 1,
California;

W. A. Gregory, William R. Denton, 65 Market Street,
San Francisco 5, California.

[File endorsement omitted]

[fol. 105]

OPINION—September 27, 1961

Petitioner is before the Court in this action with the second of two petitions seeking to enforce an award and order of the National Railroad Adjustment Board, hereinafter called the "Board". The first petition was filed in case No. 2080-SD-W, transferred to this Division from the Northern District. A motion for summary judgment was made by the defendant railroad, and we ruled that the record before us did not reveal an award and order with which the railroad had refused to comply. (*Gunther v. San Diego*, 161 F. Supp. 295.) On July 15, 1958 further proceedings were stayed because petitioner stated he had filed a petition before the Board for an interpretation of its award and order, or for the issuance of a supplemental award determinative of his right to reinstatement in active service with the defendant railroad. The Board did render an [fol. 106] award and order on October 8, 1958, but this second award was not presented to this Court in the case then before it, case No. 2080. In March, 1959, petitioner moved to dismiss the said case without prejudice; the Court denied the motion to dismiss and granted defendant's motion for summary judgment on the basis of the ruling mentioned above. In the findings and conclusions on motion for summary judgment, the Court found it was not necessary at the time to decide whether the Board had jurisdiction to order the appointment of a board of physicians to examine petitioner, and that it was not necessary at the time to consider the terms of the agreement between the defendant and petitioner's Union. The findings and conclusions in case No. 2080 are set forth in the Court's opinion reported at 192 F. Supp. 882.

Nearly two years after the rendition of the award of October 8, 1958, petitioner brought the same to the attention of this Court by a petition to enforce said award filed September 26, 1960. A motion for summary judgment filed by the railroad was denied without prejudice to the making of a similar motion on limited grounds. (*Gunther v. San*

Diego, 192 F. Supp. 882.) The railroad filed an answer, then a second motion for summary judgment, which was noticed for hearing on May 29, 1961; after statements, affidavits and briefs were filed and oral and written argument had, the motion was submitted on July 21, 1961.

The defendant is a Nevada Corporation, a railroad carrier subject to the Interstate Commerce Act, with its principal operating office located in the Southern District of California. Petitioner was employed by defendant on December 18, 1916, as a fireman and thereafter was continuously in [fol. 107] the active service of defendant until December 30, 1954. On said latter date, which was shortly after petitioner's 71st birthday, petitioner was disqualified from service after a physical examination. At his request, he was sent to the Southern Pacific General Hospital and there examined by carrier's medical superintendent, following which the chief surgeon determined that petitioner should not be returned to service. Petitioner's own physician disagreed with the company doctors as to petitioner's disqualification, and petitioner presented a claim to defendant for reinstatement to active service with back pay, and when defendant denied the claim, submitted the same to the National Railroad Adjustment Board, First Division. The findings and award of the Board, dated October 2, 1956 are included in the Appendix to this memorandum, as "Exhibit A". Following issuance of the award, a board of three physicians as therein provided was selected, and the Board, on October 8, 1959 made findings and award, which are included in the Appendix as "Exhibit B". Thereafter, defendant again refused to reinstate petitioner to active service. (Petitioner alleges the majority of the physicians found that he had no defect which in their opinion would prevent him from performing his duties as a locomotive engineer; defendant alleges the decision of the majority supported that of the Company doctors.)

The Board, in its award of October 8, 1959 ruled that the majority of the three physicians had decided petitioner had no physical defects which would prevent him from carrying on his usual occupation as engineer, and ordered

that petitioner be reinstated with pay for all time lost. [fol. 108] It is our view that the two awards and the two orders must be construed together as one award and one order, taking effect with the issuance of the second.

A collective bargaining contract was entered into between the Brotherhood of Locomotive Firemen and Engineers, petitioner's Union, and the defendant on March 1, 1935. The Agreement is on file, and portions of the same referred to by petitioner in his affidavit and in the brief of his counsel and relied upon in support of his position herein, are found in the Appendix to this memorandum under headings: "Article 35, Seniority", "Article 38, Reduction of Force" and "Article 47, Investigations".

The defendant's motion for summary judgment asks this Court to rule:

"There is no genuine issue as to any material facts, and the undeniable facts show that there is no agreement provision to support the award and order in favor of petitioner and against defendant". and,

"The First Division, National Railroad Adjustment Board, issued its Award No. 17646, Docket 33531, and its order under said docket number, under date of October 8, 1958, in excess of its jurisdiction under the Railway Labor Act. Therefore, said Award and Order are unenforceable". (Defendant's proposed findings and conclusions filed May 16, 1961, p. 3.)

Petitioner's position is that the motion for summary judgment should not be granted because, in order to interpret the contract, it will be necessary to consider evidence of custom and usage . . . this for the purpose of arriving at the intent of the parties; he maintains that those portions relating to his right of continued employment, to-wit, seniority and limited right of discharge, are ambiguous and require extrinsic evidence as an aid to their interpretation, and argues, at page 2 of his brief that "the unqualified right of defendant to determine the physical fitness of its employees is nowhere to be found in said

Agreement, whereas petitioner's right to continued employment is set forth in Articles 35 and 47 thereof" and at page 3, "The Agreement sued upon herein by providing for seniority rights and discharge only for good cause, limits the power of the employer to suspend or discharge employees from active employment."

The affidavit of petitioner in opposition to the motion for summary judgment offers testimony with reference to custom and practice. Mr. Gunther avers that for many years he was General Chairman of the Brotherhood of Locomotive Firemen and Enginemen and as such actively engaged in enforcing the provisions of the Agreement referred to in his petition. The affidavit then sets forth portions of Article 35 (Seniority), Article 47 (Investigations), and Article 38 (Reduction of Force) of the agreement and states that such provisions are vague, ambiguous and are not sufficient to specify the precise rights of the employees covered thereby with respect to duration of employment and the rights if any, of the employer to restrict same.

Petitioner continues: "That at all times pertinent herein the interpretation of said provisions, and their application to defendant's operations were done by reference to a long history of custom and practice in the railroad industry; that, for example, because the ' . . . (R)ights of engineers . . . governed by seniority in the service of the Company [fol. 110] . . . were not specified in detail in said Agreement, their substance could only be, and was, determined by resort to custom and practice in the industry'." The affidavit details the custom with reference to seniority, stating that the most senior engineer was entitled to the assignment of his preference and, in the event of elimination of such assignment by reduction of work force or otherwise, such senior engineer had the right to displace a junior, etc., and further argues "that defendant's removal of petitioner from the assignment of his choice on December 30, 1954 was in violation of petitioner's seniority rights as conferred by said Agreement, because, at said time, petitioner was senior to the engineer who replaced him on said assign-

ment and, for that matter, to all other engineers in the employ of defendant."

Petitioner's affidavit further avers "that at all times it was never the custom and practice for the active employment of an engineer covered by said Agreement to be terminated by retirement against the will of such engineer."

The brief of petitioner also urges that custom and usage may be looked to to explain the meaning of language and to imply terms where no contrary intent appears from the terms of the contract.

The defendant has filed an affidavit which alleges that locomotive engineers employed by the railroad are and have always been required by Company policy to take and pass periodic physical examinations and re-examinations to determine their fitness to remain in service; that in the year 1954 these requirements provided and still provide that employees of age seventy and over must take and pass such a physical examination every three months; that in accordance with such rule Mr. Gunther reported for physical examination on November 24, 1953 and for additional examinations or re-examinations in each successive three month period to and including December 15, 1954; that after the examination on the latter date, the defendant's physicians determined that Mr. Gunther was not qualified to remain in service as a locomotive engineer; that these findings were reviewed at the defendant's hospital, and the Chief Surgeon of the railroad concurred in the findings and in the opinion that Mr. Gunther's heart was in such condition that he would be likely to suffer an acute coronary episode; that based upon this conclusion, the railroad declared Mr. Gunther physically disqualified.

The defendant's affidavit further states that prior to December 1, 1959 locomotive engineers disqualified upon advice of the company physicians for physical reasons were either permitted to work on a restricted basis or removed entirely from active service in accordance with the recommendations of the doctors . . . and the doctors recommended that Mr. Gunther not be returned to active duty, and the defendant followed the recommendation. Defen-

dant further states that until December 1, 1959 the Collective Bargaining Agreement between petitioner's Union and the defendant contained no provision for a three doctor panel to review the carrier's findings of physical disqualification. That on August 28, 1959, the Union asked that the Agreement be amended to include such a provision, the defendant acquiesced, and the amending agreement was made between the Union and the defendant on December 1, 1959.¹

The major purpose of the Railway Labor Act (45 USCA, 151 et seq.) is to avoid strikes by employees of carriers in interstate commerce, and the consequent interruption [fol. 112] of interstate commerce, by promoting orderly and peaceful settlement of disputes affecting carriers and their employees. *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515; *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239. To that end, it is in aid of collective bargaining, and its design, purpose and result is to make such bargaining effective. *Estes v. Union Terminal Co.*, 89 F. 2d 768. It is the duty of the employer and employee under the Act to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, and to consider and determine all disputes, if possible, in conference between employer and employee and authorized representatives of each. The policy of the Act is to encourage the use of nonjudicial processes; *Brotherhood of Railroad Trainmen Enterprise Lodge No. 27, v. Toledo, etc.*, 321 U. S. 50. Thus, in the case of a "minor" dispute, one arising out of the interpretation or application of existing collective bargaining agreements and grievances arising therefrom, the parties are to confer, and if the dispute cannot be settled by conference, either party may resort to the appropriate division of the National Railroad Adjustment Board. With a "major" dispute, such as may arise from an intended change in agreements affecting rates of pay, rules or working conditions, resort to mediation and arbitration is provided for, 45 USCA 154, 155, 159. *Elgin, J. & E. Ry.*

Co. v. Burley, 325 U. S. 711, 722-724; Brotherhood of R. R. Trainmen v. Chicago, etc., 353 U. S. 30, 34; finally, the statute includes conciliation by presidential intervention. [fol. 113] We are here concerned with a dispute of the first mentioned class.² Subsection (i) of Section 153 (45 USCA) states:

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, . . ."

The Section further provides that the awards shall be final and binding upon both parties to the dispute,³ except insofar as they shall contain a money award, and that if a dispute arises concerning the interpretation of the award, the Board shall interpret the same upon request of either party. When an award is made in favor of the petitioner, the Board shall direct the carrier to make the award effective.

Subsection (p) provides that if the carrier does not comply with the order, the petitioner may file in the District Court of the United States a petition, setting forth briefly the causes for which he claims relief, and the order of [fol. 114] the Board, whereupon the suit shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the Adjustment Board shall be prima facie evidence of the facts therein

stated.⁴ The District Courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

The National Railroad Adjustment Board, created by statute June 21, 1934 (Section 153 of Title 45 USCA, a portion of the "Railway Labor Act", 45 USCA 151, et seq.) has 36 members, 18 of whom are selected by carriers and 18 by national labor organizations. The Board acts through four divisions, the first of which has jurisdiction over disputes involving train and yard-service employees of carriers, such as engineers, firemen, etc., and which has 10 members, 5 selected by carriers and five by national labor organizations. Any division has authority to establish Regional Adjustment Boards to act in its place and stead (with the same force and effect) for such limited periods as deemed necessary, membership to be divided equally between those designated by the carrier and labor members. The Section provides that upon the inability of a Division (or a Regional Board) to agree because of a deadlock or a failure to secure a majority vote, it may appoint a neutral person as Referee to sit as a member to make the award.

Each of the decisions of the First Division of the National Railroad Adjustment Board with which we are here concerned was made with the aid of a Referee.

[fol. 115] This Court has jurisdiction in the premises; the Railroad Adjustment Board has made an award in favor of an employee of a carrier engaged in interstate commerce, and the carrier has refused to comply with the order.

The jurisdiction of the Railroad Adjustment Board is limited to disputes over the interpretation and application of collective bargaining contracts between the carriers and their employees. *Southern Pacific Co. v. Joint Council Dining Car Employees*, 165 F. 2d 26.⁵ Where, as in this case, the employee maintains he was removed from service in violation of the contract, and where the carrier claims

the removal did not violate the contract, a dispute concerning the interpretation or application of a collective bargaining agreement of which the Board has jurisdiction under the Act is presented.

The Agreement must be deemed to incorporate the provisions of the statute, thus we must examine both the Railway Labor Act and the Agreement in making our decision to enforce or set aside the decision of the Board. The petitioner is entitled to reinstatement only if wrongfully removed from service, and he was wrongfully removed only if some right arising out of the contract or the law was violated.

The employer-employee relationship existed long before the origin of collective bargaining agreements made effective by labor laws, and one of the common law rights inherent in such a relationship is the right of the employer to hire and fire his employees. This right exists today, except to the extent that it may be modified by statute or contract. *United States Steel Corp. v. Nichols*, 229 F. 2d 396. Such right is not abridged by the Railway Labor Act or the Labor Relations Act so long as the collective [fol. 116] bargaining process is not impaired. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45; *Texas & N.O.R. v. Brotherhood of Ry. and S. S. Clerks*, 281 U.S. 548; *N.L.R.B. v. Superior Co.*, 199 F. 2d 39, 42; *N.L.R.B. v. Tennessee Coach*, 191 F. 2d 546, 550; *Beeler v. Chicago R. I. & P. Ry. Co.*, 169 F. 2d 557, 560.

No claim is made that petitioner's union activities or lack of them had anything to do with his removal from service.

In interpreting this particular Agreement, and in order to call to our aid the reported cases, it is necessary to consider the nature of the collective bargaining process, as well as the numerous types of agreements to which the published opinions relate. The collective bargaining provisions of the Railway Labor Act are similar to those of the Labor Relations Act, and cases interpreting the provisions of agreements executed under one Act may be of aid in interpreting agreements under the other, pro-

vided we do not overlook differences in the types of agreements or in the laws relating to their enforcement."

The Agreement before us is what we might call a "bare-bone" agreement, in that it relates mainly to wages, hours, seniority, and discharge. No mention is made regarding disability of an engineer, other than in Article 29, where it is stated that if an engineer is physically disabled on account of the loss of the sight of one eye, and is required to give up his run, he will have the privilege of displacing any engineer junior in branch service. (No provision is made for an engineer losing *both* eyes.)

The simplicity of the Agreement is understandable in view of the fact as stated by eminent writers on the [fol. 117] subject (Professors Archibald Cox and John T. Dunlop, "Regulation of Collective Bargaining by the National Labor Relations Board", Harvard Law Review, 1950, Vol. 63, pp. 389, 391), that in early years of collective bargaining the unions were busy organizing additional workers and securing agreements on familiar subjects, and many unions, strong enough to present broader demands, were content to bargain on such traditional subjects as wages, hours of work, seniority and union status.

Some of the modern-day agreements contain clauses setting forth certain areas as "strictly within management prerogatives", others contain clauses to the effect that "past practices shall not be changed except by mutual consent", still others provide that neither side "will assert any right during the term of the contract to bargain on any subject covered or referred to in the contract", still others contain "no-strike" clauses and provide that disputes over the interpretation of the contract shall be referred to arbitrators. As was said by the Supreme Court in *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 580, "The mature labor agreement may attempt to regulate all aspects of the contemplated relationship from the most crucial to the most minute over an extended period of time".

None of the provisions mentioned in the preceding paragraph is found in the Agreement involved herein.

Professors Cox and Dunlop, in the article above cited, have noted that as union power increased, some sought to expand the scope of joint-management decisions into areas for which management traditionally had exclusive responsibility—not only pensions and merit increases, but also the scheduling of shifts, subcontracting and technological [fol. 118] change—expanded the scope of their demands until they came in contact with management's reluctance to surrender its "prerogatives" and sharp controversies resulted over the proper functions of management and union.

It is just such a "sharp controversy" that we have before us, except the controversy is not between the Union and the carrier, but relates only to an individual employee. Management claims that the employee must point to a provision in the Agreement prohibiting the action it took, the worker points to the provisions regarding seniority and discharge but in the same breath says they are ambiguous and must be explained by extrinsic evidence, and in another breath intimates that even if with these aids his position is not clarified, the Railroad Adjustment Board has power to "imply" terms into the contract to support its decision.'

What rights did the Railroad possess when it went into the bargaining room with the Brotherhood 26 years ago? What rights did it lay on the bargaining table? Were all of those rights mentioned in the contract? Or did the Union put some in its pocket to use when needed? Or did management retain those not in the contract?

We know that management took with it the common law right to hire and fire at will, except for certain statutory restrictions not pertinent here. It is our task to ascertain what happened to such right and what portion of it resided with the defendant when it removed petitioner from service.

It is obvious from a reading of the Agreement that neither the seniority clause (lay-off provisions refer also to seniority) nor the clause pertaining to discharge (headed "Investigation") contains any words referring to retirement for physical disqualification or for any other reason.

In fact the entire agreement has no words referring to such [fol. 119] matters, other than the clause we have mentioned having to do with an engineer who has lost one eye.

Perhaps because the meaning of "seniority" is so well understood and judicially determined, there have been few cases where the issue of retirement for any reason as contravening the seniority clause by itself, has been considered by the courts. In most of the reported cases, if seniority is referred to by the employee in presenting his case against retirement, it is coupled with a contention that the retirement violated both the seniority and discharge clauses of the collective bargaining agreement.^a

Hon. Paul J. McCormick, the late Chief Judge of this District, sitting with the Court of Appeals of our 9th Circuit, observed, most aptly in *Colbert et al. vs. Brotherhood of Railroad Trainmen et al.*, 206 F.2d 9, 13, that "seniority among railway workers is contractual and it does not arise from mere employment and is not an inherent, natural or constitutional right." (See also, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-339; *Aeronautical Industrial District Lodge 727 vs. Campbell*, 337 U.S. 521, 526-527; *Trailmobile Co. vs. Whirls*, 331 U.S. 40, 52-54; *N.L.R.B. vs. Int. Assoc. of Machinists*, 279 F.2d 761, 765; *McMullans vs. Kansas etc. Ry.*, 229 F.2d 50, 53.)

We have no difficulty in ascertaining the meaning of "seniority" as it appears in this Agreement, and our interpretation is in accord with that of many reported opinions. Seniority, as it applies to trainmen, means: "the oldest man in point of service (*ability and fitness for the job being sufficient*) is given the choice of jobs, is the first promoted within the range of jobs subject to seniority, and is the last laid off. It proceeds so on down the line to the youngest in point of service." *Dooley vs. Lehigh Valley* [fol. 120] R. Co. of Penna. 130 N.J. Eq. 75, 21 A.2d 334, 335, affirmed per curiam, 131 N.J. Eq. 468, 25 A.2d 893. (Emphasis supplied.) (See also: *Seaskiewicz vs. General Electric Co.*, 166 F.2d 463, 465; *Fine vs. Pratt*, 150 SW 2d, 308, 311, an oft cited decision; *Order of Railway Conductors of America vs. Shaw*, 189 Okl. 665, 119 P.2d, 549.)

In *Goodin vs. Clinchfield Railroad, etc.*, 125 F. Supp. 441, affirmed (per curiam) 229 F.2d 578, cert. den. 351 U.S. 953, the question was whether the action of the union and the employer in agreeing to add a compulsory retirement clause to the contract contravened the employees' rights under the contract, including seniority rights, and the District Court stated, p. 448:

"If the Railroad through union contract surrenders its right to terminate plaintiffs' employment at an age of its own choosing and accepts seventy as the termination age, this is no more than an implied agreement by the Railroad to continue the employment of conductors and trainmen until they reach seventy before terminating because of age. Without the contract the employer could terminate them at any time. A collective bargaining agreement upon age seventy as the termination age is not an abridgement of any right of the employees but only an abridgement of the employer's right."

The opinion in *United Protective Workers of America vs. Ford Motor Co.*, 194 F.2d 997, 1002, to which we shall refer later in another connection, held compulsory retirement of an employee did not violate the seniority provisions of the contract because such retirement was not a "lay-off". [fol. 121] In *Held vs. American Linen Supply*, 307 P.2d 210, the Supreme Court of Utah, citing *Fine vs. Pratt, Tex. Civ. App.* 150 SW 2d, 308, said:

"The right of seniority as hereinbefore defined is not inconsistent with the right of the employer to discharge his employee. A right of seniority as we think of it exists upon the assumption of a continuing employment. It is superimposed upon status of employer and employee."

We turn now to the provision of the Agreement between petitioner's Union and the Railroad which has to do with discharge, Article 47, headed "Investigations". We find

wording that "no engineer shall be suspended or discharged except in *serious cases* where *fault* is apparent without a fair and impartial hearing." (Emphasis supplied.) We note the engineer is entitled to select an engineer in his same seniority district to represent him, or the regularly constituted committee of the Brotherhood of Locomotive Engineers can appeal through the proper officials to the highest authority; when a formal investigation is held, the engineer is entitled to representation by his Local (union) or any employee in his seniority district; the Superintendent or his representative may interrogate as may the engineer and his representative. We note also the following wording: "Where *charges* are made regarding engineers, same must be in writing. No *demerits* will be charged against the engineer's record without giving him an opportunity for *defense* and allowing him to present his side of the case, and finally (Section 1(d)):

"If an engineer is suspended or discharged and is proven to have been *innocent of the offense charged*, [fol. 122] he shall be reinstated and paid \$8.79 per day for time lost on such account." (Emphasis supplied.)

We have been able to discover only one reported judicial decision, where a situation is presented in any way similar to the one before us.

In *Wilburn vs. Missouri-Kansas-Texas R. Co. of Texas*, 268 S.W. 2d, 726 (Texas App), the railroad employee sued in the state court for damages for wrongful discharge. He said that he had been examined by the company doctor, told he was physically disqualified and removed from work on the railroad. He maintained he was entitled to an examination by a Board of Doctors (to be appointed in the same manner as decreed by the Railroad Adjustment Board in this case) and that he was refused such examination, and that the refusal and his consequent discharge constituted a breach of the collective bargaining agreement. He pleaded a portion of the agreement, Rule 81(a) which read that no employee should be discharged or suspended without *just and sufficient cause* without being given an investigation,

hearing, witnesses, etc. "and if found not *guilty*" (emphasis supplied) he should be reinstated with back pay.

The Court noted that the employee received notice of his removal from work in February of 1950, and that a provision regarding the employees' right to an examination by a Board of Doctors was not added to the collective bargaining agreement until April of 1950. In speaking of Rule 81(a) of the Agreement, the Texas Court observed that applicant's tenure of employment would have been "at will" except for said Rule relating to wrongful discharge, and that such a provision bore no relation to a removal from service because of physical disqualification, [fol. 123] but had to do with disciplinary measures. In holding that the plaintiff had no cause of action for wrongful discharge under the Agreement as it stood when he was disqualified, the Court stated at page 734:

"There is a wide difference between a discharge because of affirmative action and a disqualification on account of physical disability as expressed in the contract which has been pleaded by the plaintiff." °

We have read carefully the two cases entitled *United Protective Workers vs. Ford Motor Company*, 194 F.2d 997 and 223 F.2d 49. We have likewise studied the decision in *U. S. Steel Corp. vs. Nichols*, 229 F.2d 396 (reversing *Nichols vs. National Tube Co.*, 122 F.Supp. 396) where some attention was given to established practice of the industry. We do not view these cases as authority that we should consider custom and practice in this case. These decisions deal with compulsory retirement because of age only, refer to "just cause" provisions in the contracts, and do not indicate these contracts contained wording such as in the Agreement before us. It is true that here, as in the three cases just cited, the employee's service was terminated just as effectively by retirement as by discharge, but the contracts appear to be different, and as was said in the *Nichols* case (229 F.2d 396, 402) "... in dealing with rights and obligations under a written instrument we cannot ig-

nore distinctions expressly made by the wording of the instrument merely because the end result is the same".

The Agreement before us does not state that if an employee is discharged without "just cause" he is to be reinstated. It says if he "is found innocent of the offense charged" he must be reinstated. This phrase and the other words we have emphasized "fault", "charges", "demerits", [fol. 124] "defense" show that a "derogatory type of discharge" because of violation of a rule made for, or commission of an act detrimental to, the good of the service is contemplated. To apply these terms to an obviously upright and faithful employee such as petitioner would be inconceivable.

We hold that the seniority and discharge clauses of the Agreement are unambiguous, do not require the introduction of oral testimony in aid of their interpretation and do not, either singly or jointly, prohibit the retirement of an employee deemed physically disqualified by his employer to perform the duties of his position.

It is plainly indicated that by the seniority and discharge clauses we have discussed the defendant surrendered a portion of its common law right to manage its business as it saw fit. We think it is necessary for us to decide if, by the act of entering into a collective bargaining agreement, other management rights became affected, though not adverted to in the contract. This calls for a consideration, we believe of the "residual" or reserved rights theory: that management remains free to control its business except as limited by the collective bargaining contract.¹⁰

We find early enunciation by the courts supporting the "residual rights" theory in collective bargaining under the Railway Labor Act. We believe the first case in which a court construed the award of a Railroad Adjustment Board was *Estes v. Union Terminal Co.*, 89 F. 2d 768. There the learned Circuit Judge Hutcheson (5 Cir.) in a strong concurring opinion (p. 774), observed that the individual employees had no individual rights which they could press against the employer as to tenure or seniority apart from the test of the collective bargaining agreement, and sub-

ject to the agreement any of them could be let out at the will of the carrier.

[fol. 125] Again referring to the opinion in the case of *Goodin vs. Clinchfield Railroad*, supra (129 F.Supp. 441, affirmed 229 F.2d, 578, cert. den. 351 U.S. 953) from which we have quoted when discussing seniority, we emphasize the phraseology which states that the acceptance of an employer of a compulsory retirement provision is a *surrender* of his right to terminate the employee at any time.

In *Brotherhood vs. Atlantic Coast Line R. Co.*, 253 F.2d 753, 758, the National Railroad Adjustment Board ordered an employee reinstated who had been discharged because he allowed a photographer to come on railroad property and take pictures to be used against the company in a damage action. The Board held that because the employee had violated no rule of the agreement the discharge was arbitrary. The Court of Appeals sustained the lower court in refusing to enforce the Board's order and stated that the Board was "manifestly in error in holding that the discharge was wrongful merely because no rule of the current bargaining agreement had been violated."

Reviewing cases decided under the National Labor Relations Act we likewise find definite views that some of the inherent rights remain in the employer after the collective bargaining contract is executed.

In *J. A. Case vs. Labor Board*, 321 U.S. 332, at 335, the Supreme Court remarked:

"After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge."

[fol. 126] The *Inland Steel* decision, supra (170 F.2d 247, cert. den. 336 U.S. 960) held (p. 252) that absent a retirement clause in the agreement (which already included seniority and discharge provisions) the Company could retire the employee at any age.

In *United States Steel Corp. vs. Nichols* (supra, 229 F.2d 396) the Court of Appeals at page 398 of the decision mentioned that the lower court was of the opinion that the employer could not withhold an employment right unless such withholding was recorded or reserved by the contract, and that there was no contractual right of the employer in the collective bargaining agreement which authorized him to compulsorily retire an employee because of age. In reversing the District Court, the Court of Appeals referred to *N.L.R.B. vs. Jones and Laughlin Steel Corp.* 301 U.S. 1, 45, and stated that the common law right of an employer to select and hire employees and terminate employment was not inhibited by any statute applicable to the case before it, and ruled: (p. 399)

" . . . It would seem to logically follow that the common law right on the part of the employer to select his employees and to terminate their employment at will continues to exist except to the extent that it may be modified by the bargaining contract with the Union. Instead of making this right dependent upon a provision to that effect in the contract, it is a right which an employer normally has unless it has been eliminated or modified by the contract. Accordingly, we are not in agreement with what we construe to be the District Judge's conclusion of law that since there was no provision in the collective bargaining contract [fol. 127] authorizing the termination of appellee's employment by reason of age, such right did not exist."

At another paragraph on the same page we find the following language:

" . . . Although it may be the theory of the law that collective bargaining may at times or eventually accomplish that result, the express language of the Labor-Management Relations Act, Sec. 158(d) Title 29 U.S. C.A. and the authorities above referred to make it clear that a collective bargaining agreement does not necessarily express the full coverage of employment rights.

It covers such matters only as the parties may have been able to agree upon and leaves unresolved such issues as the parties may not have been able to agree upon and with respect to which the law does not require a concession by either party."

The Court of Appeals felt it necessary to determine from a consideration of the contract whether termination because of age was prohibited instead of searching for a provision authorizing it, and observed at page 400:

"This requires the application of the usual rules involved in the construction of a written instrument."

In *N.L.R.B. vs. Nash-Finch Co.*, 211 F.2d 622, a case cited in the *Nichols* case as sanctioning the application of the usual principles of contract construction, the employer, after a collective bargaining contract had been executed, terminated certain insurance and Christmas bonus benefits. [fol. 128] The Court of Appeals (Judge Sanborn speaking) refused to sustain the finding of the National Labor Relations Board that the employer had committed an unfair labor practice and in setting aside the Board's order said: (p. 626)

"Where parties to a contract have deliberately and voluntarily put their engagement in writing in such terms as import a legal obligation without uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing. *Ford vs. Luria Steel & Trading Corp.* 8 Cir. 192 F.2d 880, 884 and cases cited.

"The following language from *Printing & Co. vs. Sampson*, L.R. 19 Eq. 462, 465, has several times been approved by the Supreme Court of the United States: '... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have utmost liberty of contracting, and that their contracts, when entered into

freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.' See *Baltimore & Ohio S.W.R. Co. vs. Voight*, 176 U.S. 498, 505, 20 S.Ct. 385, 387, 44 L.Ed. 560; *Twin City Pipe Line Co. vs. Harding Glass Co.*, 283 U.S. 353, 356, 51 S.Ct. 476, 75 L.Ed. 1112."

[fol. 129] In addition to subscribing to the familiar principles of contract law announced in the Nash-Finch and Nichols cases just discussed, we find that other principles of the law of contracts apply. In *Atlantic Coast Line Railway Company v. Brotherhood*, 210 F. 2d 812, 813, the Court observed that collective bargaining agreements like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity, and the Court in *Virginian Railway etc. Co. v. System*, 131 F. 2d 840, 842 counsels that collective bargaining agreements be given a realistic interpretation. It would indeed be "unrealistic and absurd" to hold that if an engineer did not wish to retire he might keep his hand on the throttle during the remainder of his lifetime.

Another principle which we find applicable here is that an exception to what is normally included in a particular type of a contract should be, and usually is, spelled out with such clarity that there can be no doubt as to its meaning. *Sigfred v. Pan America etc.*, 230 F. 2d 13, 18. A provision restricting an employer's right to retire an employee because of age or physical disqualification, would have been an exception in the era in which this Agreement was negotiated, the year 1935. This, because the first authoritative ruling placing compulsory retirement among the subjects upon which the Act permitted collective bargaining, and holding that the employer was at least required to discuss such a matter with the union, was the decision, in 1948, in *Inland Steel Co. v. National Labor Relations Board*, *supra*, 170 F. 2d 247, cert. den. 336 U.S. 960. In this case the Court stated that seniority and discharge provisions had long been accepted as matters for negotiation. And, as late as [fol. 130] 1956 we find able-bodied engineers over 70 con-

tending that a compulsory retirement provision at age 70 which the union and the employer had added to the agreement was not properly a subject for collective bargaining. *McMullans vs. Kansas, Oklahoma and Gulf Railway*, 229 F.2d 50, cert. den. 351 U.S. 918. See also *Goodin vs. Clinchfield, etc.* 125 F.S. 441, affirmed 229 F.2d 578, cert. den. 351 U.S. 953.

Finally, it appears to this Court that there is language in the opinion in *Steelworkers vs. Warrior & Gulf Co.*, 363 U.S. 574 (1960) at p. 583, which supports the theory that rights of the employer not treated in the contract are left for the employer to exercise, at least where a "bare-bone" contract such as the Agreement here is presented.

"Collective bargaining agreements regulate or restrict the exercise of management functions. They do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement it may be exercised freely except as limited by public law and by the willingness of employees to work under the particularly, unilaterally imposed conditions. *A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages.* When, however, an absolute no strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either [fol. 131] management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes." (Emphasis supplied)

Accordingly, we hold that the right of the carrier to terminate the employment of its workers, except as prohibited by statute, remains with such carrier to the extent not surrendered by the terms of a collective bargaining agreement, and that the extent of such surrender is to be determined by the plain words of the agreement under the rules governing the interpretation of contracts.

The carrier here exercised a right which it had not surrendered by the act of executing a collective bargaining agreement, or by virtue of its terms.

There is another principle of contract interpretation which applies to collective bargaining agreements. A right of termination which remains with the employer has attached to it his implied covenant not to use it in bad faith and unfair dealing to destroy or injure the employee's right to the fruits of the contract. (See Williston, *Contracts*, Rev. Ed. 1936, Section 670; Cox, "Legal Nature of Collective Bargaining Agreements, *University of Michigan Law Review*, Nov. 1958, Vol. 57, No. 1, p. 1, 17.)

It is in some of the cases where a bad motive or unfair dealing with intent to frustrate rights under the agreement is charged that we find evidence of custom and usage in plant and industry, established practices and so on, introduced either to establish unfair motive or to refute the existence of it. This is especially true of cases under the National Labor Relations Act.¹¹

Here no bad faith motive or unfair dealing was charged in the complaint, and none was found by the Railroad Adjustment Board. In fact, from the record before the Board [fol. 132] as the same is set out in the findings (we refer both to the first, or conditional award and the second or final award) the contrary appears. This, especially, considering the known fact that the operation of a train is an exacting task, a dangerous and hazardous business, (*Chicago & A. R. Co. vs. U. S.*, 247 U.S. 197; *Atchison R. Co. vs. U. S.*, 244 U.S. 336) that the carrier is chargeable with the utmost care and diligence,¹² that the petitioner had been twice examined by the carrier's physicians and twice found disqualified, and that it cannot be said the retirement of a 70 year old engineer is not directly related to the safety of the public, whether he is physically disqualified or not. (*Goodin vs. Clinchfield*, *supra*, 125 F.S. affirmed per curiam 229 F.2d 578, cert. den. 351 U.S. 953.)

We are able to accord prima facie weight to all findings of fact of the Board which are here material—that is, when it is possible to separate such findings from conclusions

of law.¹³ But a Railroad Adjustment Board must operate on jurisdictional tracks, laid out by statute, their scope reaching only so far as the limits of the Agreement. If a derailment occurs, the order or award is unenforceable.¹⁴

The Board should have interpreted the Agreement as we have done here, and should have dismissed the claim prior to making its first, or conditional award.

Instead, it proceeded to construe its jurisdiction erroneously, in view of the Agreement as it then stood. Then it proceeded to set up a board of physicians to make its decision for it, a procedure not consonant with a "desirable degree of uniformity" among Railroad Adjustment Boards, a procedure without a shred of sanction from contract or statute.¹⁵

In such a situation, we do not think there is represented [fol. 133] the type of administrative construction to which we are required to make judicial obeisance.¹⁶

It is possible the Board was actuated by a desire to perform a public service, and a procedure similar to that it prescribed was, as we have mentioned, several years later incorporated into the Agreement through collective bargaining under the provisions of the statute relating to change of contract. Such change did not have a retroactive effect.

It is desirable to settle controversies on the basis and within the confines of existing contracts wherever possible, instead of compelling resort to the machinery provided by statute for changing collective bargaining agreements. This principle has been established, probably because those construing the agreement feel that when all is quiet on the labor front there is no use risking hostility at the bargaining table. Management and unions may also feel reluctance, for once negotiations are started about a new clause, management may ask the relinquishment of a right already conceded, or labor make other demands.

A purpose of the Act, however, is to encourage collective bargaining. Just as a garment may become too short or too small to cover a growing child, so may a bargaining agreement fail to meet requirements of both labor and manage-

ment as the years go by. A wise tailor knows that a garment may be stretched just so far without weakening the fabric or pulling it apart at the seams, and he will add a new piece of material rather than ruin the entire garment.

Neither the Board nor this Court could stretch this 1935 bargaining agreement to cover the situation which arose in 1954. A new piece, but from the material of employer's residual rights, had to be added. That the employer chose [fol. 134] to relinquish the material, and what the result will be of allowing others than itself to determine the fitness of engineers to handle the dangerous instrumentalities of its locomotives, is not for the consideration of this Court in this particular litigation. Neither the Court nor the Board could be the tailor who added the material. The task belonged to labor and management.

The record before us shows there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Rule 56, Rules of Civil Procedure.)

The award and order of the Railroad Adjustment Board should not be enforced.

Dated this 27th day of September, 1961.

Jacob Weinberger, United States District Judge.

[fol. 135] Opinion Notes to case No. 2459-SD-W, F. J. Gunther v. San Diego & Arizona Eastern Railway Company, a corporation.

¹ We speak of the contract as it read at the time of petitioner's disqualification from service, unless otherwise indicated.

² Brotherhood, etc., v. N. Y. Central R. Co., 246 F. 2d 114, cert. den. 355 U.S. 877.

³ The words "final and binding" have their limitations. Dahlberg v. Pittsburgh & L. E. R. Co. et al, 138 F. 2d 121, 122. When the award is unfavorable to the employee, the Board's decision is final. Washington Terminal Co. v. Boswell, 124 F. 2d 235, 245, affirmed 319 U.S. 732. When it is unfavorable to the carrier, the decision may not be enforced except as the court orders, after an enforcement suit is brought by the employee. The Court hears the case *de novo* and may enforce or set aside the Board's decision.

*The duties of the Court with reference to the findings and awards of Railroad Adjustment Boards have been well defined in the reported cases. *Washington Terminal Co. v. Boswell*, supra, n 3. states at p. 241: "It cannot be assumed, therefore that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to [fol. 136] that of expert testimony." *Dahlberg v. Pittsburgh & L.E.R. Co. et al*, supra, (n 3.) at p. 122: "The Act provides that the suit for enforcement shall 'proceed in all respects as other civil suits' except that the findings and award 'shall be prima facie evidence of the facts therein stated'. . . . These procedural directions are particularly appropriate to a trial on the merits of disputed issues of both fact and law; less so to a mere examination of the scope of the Board's authority. Some of the reasons assigned for the weight to be given the Board's findings are: The employee has the advantage of having a prima facie case prepared for him when he files an enforcement suit in the District Court and is thus spared such expense, *Washington Terminal V. Boswell*, supra; The Board has "expertise adapted to interpreting such agreements", *Elgin J. & E. R. Co. v. Burley*, 327 U.S. 661, 664, 665; and as observed in *Slocum v. Delaware*, etc. 339 U.S. 239, 243, "Precedents established by it, while not necessarily binding provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railroad systems".

⁵ Cert. den. 333 U.S. 838; *Thomas v. New York C. & St. L. R. Co.*, 185 F. 2d 614, 616.

*In this connection, we keep in mind Mr. Justice Rutledge's warning in *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, 243, affirmed 319 U.S. 732, against ignoring "the always present limitation upon judicial language imposed by the facts concerning which it is used."

[fol. 137] ⁷ Some of the language in the 1960 Supreme Court opinions, *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers of America v. Warrior and Gulf*, etc., 363 U.S. 574 and *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 might seem to lend support to petitioner's theory. For instance, in the *Warrior* case opinion, at pp. 578 and 579 it is said:

"The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See *Shulman, Reason, Contract and Law in Labor Relations*, 68 *Harv. L. Rev.* 999, 1004-1005. The collective agreement covers the whole employment relation-

ship. It calls into being a new common law—the common law of a particular industry or of a particular plant. . . .”

The opinion (p. 579) quotes Professor Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-1499:

“ . . . (I)t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and the employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage an enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is [fol. 138] founded. . . .”

Likewise, there is language in the first two sentences of a paragraph in the *Enterprise* opinion which seems to aid petitioner, but serves to leave him without comfort in the third, pp. 598, 599:

“The collective bargaining agreement could have provided that if any of the employees were wrongfully discharged, the remedy would be reinstatement and back pay up to the date they returned to work. Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide, and that therefore the arbitrator's decision was not based upon contract. *The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. . . .*”

We emphasize the last sentence because, under the Railway Labor Act the District Court is required, in a suit for enforcement of an award, to review the merits of every construction of the contract.

In the *Enterprise* case, the Court further discussed the finality of the arbitrator's award, and stressed the premise that “the question of interpretation of the collective bargaining agreement is a question for the arbitrator.” It stated: (p. 599)

“ * * * * It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns the construction of the contract, the courts have no business [fol. 139] overruling him because their interpretation of the contract is different from his.”

In the *American* case the Court similarly stressed the importance of the arbitrator, at page 568:

“ * * * * Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment *and all that it connotes* that was bargained for.” (Emphasis supplied.)

In the *Warrior* case at p. 581, the Court stated:

"The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of the courts * * * *"

The Court also, at p. 581, quoted from the late Dean Schulman, as follows:

"A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties * * * *"

There are other pronouncements in these opinions which serve to underline the Supreme Court's views of the arbitrator's functions and the finality to be accorded his decisions. We need not set them [fol. 140] all out, for their phraseology likewise makes it clear that the references are to provisions in modern-day contracts unlike the Agreement here, and to rules of enforcement not intended to be applicable under the Act which governs this Court in this proceeding.

In *Brotherhood, etc. v. Atlantic Coast Line R. Co.*, 253 F. 2d 253, Chief Judge Parker of the Fourth Circuit, said at p. 757:

"If it had been intended, as appellant argues that the orders of the Board rendered pursuant to 45 U.S.C.A. 153 should have the effect of awards of arbitrators, some such provisions as are contained in 45 U.S.C.A. 158 and 159 which relate to arbitration under 45 U.S.C.A. 157 would have been provided for their enforcement. The fact that an entirely different provision was made for the enforcement of arbitration awards entered under the existing statute relating to arbitration is a matter which cannot be ignored and which shows clearly that Congress did not intend Board orders to have the effect of arbitration awards".

* There are several interesting decisions in the Labor Arbitration Reports. Most of the arbitrators, when considering seniority have likewise considered the discharge clause of the labor contract in connection with retirement for age.

In *Todd Shipyards Corp.*, 27 LA 153 the arbitrator held that the employer might put a compulsory retirement plan into effect [fol. 141] if no restriction in the contract and if in conformity with established policy. To the same effect, is *Sandia Company*, 27 LA 669.

Another interesting arbitration decision is that of Louisville Public Warehouse, 29 LA 128. There it was held that a discharge for age was not permitted where the contract prohibited "discharge except for cause". This decision enunciated the ruling that the management had the authority to discharge because of *inability*, and said the employer had the sole right to determine whether an employee was capable, so long as determination was not arbitrary, capricious or discriminatory. Transworld Airlines, Inc., 31 LA 45 held definitely that retirement for age contravened the seniority provision, and cited Nicholls Tube Co., 122 F. Supp. 726, which case was later reversed in 229 F. 2d 396. The Transworld case attached significance to the contract clause that older employees should be given lighter work.

In Hale Brothers Stores, 32 LA 713, the arbitrator quoted the Court of Appeals decision in U.S. Steel v. Nichols, 229 F. 2d 396, at 400, and approved of the wording which stated in effect that instead of searching for a provision in the contract authorizing termination, the court should look to see if the same were prohibited. The arbitrator remarked that "the reserved rights theory expounded by the Circuit Court is perfectly orthodox arbitration doctrine." This arbitrator held that the introduction of an involuntary retirement plan because of age only, where no established plan had been in effect violated employment security, but did not refer to a particular clause in the contract.

In Western Air Lines, 33 LA 84, 87, the arbitrator held that [fol. 142] retirement was not covered under the heading of seniority; that there was nothing in the agreement between the union and the employer to prohibit forcing a pilot to retire at age 60, and a common law right to manage its affairs furnished a proper basis for such action of the employer.

"In commenting upon the addition to the collective bargaining agreement of the clause providing for the appointment of a board of physicians, the Court further observed: "This, in our opinion, is a matter that should be properly left for negotiation between carrier and its employees, if such an arrangement is to be deemed desirable. *We do know that the general principle of recognizing in carrier the clear right to establish certain physical standards that all employees must meet is well established* * * * ." (Emphasis supplied.)

¹⁰ Eminent writers have discussed this subject frequently:

In the February, 1961 issue of the Labor Law Journal (Col. 12, No. 2, p. 167) Frank R. DeVyver, Chairman of the Department of Economics and Business Administration at Duke University, Durham, North Carolina, said:

"American employers are bound by a collective bargaining agreement which runs for some fixed term. Under these agree-

ments, management remains free to lay off workers, and shifts, remove shifts, and change the methods, processes and materials [fol. 143] of work—subject only to the protection of the rights of workers contained in the agreement.”

Gerald D. Reilly, 1957 Vice-Chairman of the American Bar Association Labor Law Section, in *Labor Law Review*, January, 1957, Vol. 8, No. 1, 19 at 23, observed:

“Most lawyers conceive, and I think correctly—of a collective bargaining agreement as limiting management’s discretion only in respect to such matters affecting employer-employee relationships as are specifically touched upon in the contract. This theory of residual rights, however, has not been universally accepted by arbitrators.”

Professor Cox, “Legal Nature of the Collective Bargaining Agreement”, 57 *Michigan Law Review*, 1958, 1959, at p. 35 said, in discussing what he termed the “reserved rights view”:

“* * * Most judges appear to adopt this position without qualifications, although few of them have felt impelled to state the doctrine squarely. Professor Gregory may overstate the case when he says that apart from its unpopularity with unions the doctrine is generally accepted, but I suspect a poll of arbitrators would give the doctrine a majority, provided that the ballot was secret. Furthermore, it is at least historically accurate to describe collective bargaining agreements as instruments by which the unions have gradually taken away the erstwhile prerogatives of management.”

[fol. 144] And on the question of whether custom and practice should be read into Agreements we note the following expressions:

In an article entitled “Reason, Contract and Law in Labor Relations,” 68 *Harvard Law Review*, 1955, p. 999 at 1011, the late Dean Schulman stated he doubted if there were any general understanding among employers and unions about the “viability of existing practices during the term of a collective bargaining” and was of the opinion that in many enterprises the execution of a collective agreement would be blocked if it were insisted in a broad provision that ‘all existing practices, except as modified by this agreement shall be continued for the life thereof’ and that the execution would also be blocked if the converse provision were demanded.

In “The Duty to Bargain Collectively During the Term of an Existing Agreement,” *Harvard Law Review*, 1950, Vol. 63, No. 7, p. 1097 stated at p. 1118 that the writers advocated a view of construction which would hold that the parties to “a comprehensive collective bargaining agreement, in the absence of contrary evidence, are to be presumed to have executed the agreement upon the understanding that major conditions of employment not covered

by the agreement would continue 'as they were' unless changed by mutual agreement". (Emphasis supplied.)

In the articles from which we have quoted Dean Schulman, Professor Cox and Professor Dunlop, they plainly were referring to collective bargaining agreements with arbitration clauses.

[fol. 145] ¹¹ United Protective Workers of America v. Ford Motor Co., 194 F. 2d 907, 1003.

N.L.R.B. v. Adkins Transfer Co., 226 F. 2d 324, 325.

N.L.R.B. v. McGahey, 233 F. 2d 406, 411.

United States Steel Corp. v. Nichols, 229 F. 2d 396, 402.

¹² In Minneapolis, etc. v. Rock, 270 U.S. 410, 414, the Supreme Court said:

"The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the Act is calculated to stimulate them to the proper performance of that duty. Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations."

In Ford v. Carew & English, 200 P. 2d 828 (Cal. App. hearing denied) the statement of facts showed that a 67 year old driver for a limousine carrier of passengers lost consciousness at the wheel and crashed into a light standard. The evidence showed that he possibly suffered from "strained heart muscles". The Court held that whether the defendants had reason to anticipate such an attack was a question for the jury.

[fol. 146] ¹³ There is no conflict between the Board's findings as to material facts and those alleged in the pleadings and affidavits on file in this case.

¹⁴ Thomas v. New York, Chicago & St. Louis R. Co., 185 F. 2d 614, 617:

" * * * While the Board under the statute has jurisdiction to hear an individual grievance, it is not authorized to write a contract for the parties nor to create substantial legal rights."

¹⁵ There are many decisions construing action of a National Labor Relations Board whose general effect may be applied to a Railroad Adjustment Board: N.L.R.B. v. Union Pacific States, 99 F. 2d 153, 177 (9 Cir., Judge Garrecht), the Act is not intended to empower the Board to substitute its judgment for that of the employer in the conduct of his business; Martel Mills Corp. v. N.L.R.B.: Board in protecting employee and promoting industrial peace must likewise be mindful of the welfare of the honest em-

ployer; *N.L.R.B. v. Nash-Finch*, 211 F. 2d 622, 627: Board cannot bestow upon union employees the benefits which it believes the union should have obtained but failed to obtain for them as a result of its collective bargaining with employer; *N.L.R.B. v. McGahey*, 233 F. 2d 406, 413: Board cannot "second-guess" management or give it gentle guidance by over-the-shoulder supervision; *N.L.R.B. v. Lewin-Mathes Co.*, 285 F. 2d 329, 333: Board should not use its functions to endeavor to compel concessions at the bargaining table.

[fol. 147] ¹⁶ Attached to defendant's brief is a copy of a decision of Special Adjustment Board No. 18, July 22, 1959, Thomas J. Mabry, Chairman and Neutral Member. The Order of Railway Conductors (on behalf of brakeman O. F. Lemon) and the Southern Pacific Company were parties to the dispute. In its opinion, the Board cited 7 decisions of the First Division, and 3 from other Divisions in support of its holding that the Board lacked authority, absent a provision in the contract, to pass upon the physical fitness of a railroad man disqualified by the Company physicians, or to set up a board of independent physicians for such purpose. The Special Adjustment Board No. 18 also cited *Thomas v. New York, Chi. & St. L. R. R.*, 185 F. 2d 614, 617 and *Hunter v. A. T. & S. F. Ry.*, 171 F. 2d 594, and stated that under the agreement as it was written at the time, the carrier's physicians must make the determination as to fitness for service.

This well reasoned decision demonstrates that the Board in the instant case was incorrect in its statement that "it had been consistently held" that it had jurisdiction to determine whether the employee had wrongfully been deprived of service, and also demonstrates a lack of uniformity of administrative construction as to jurisdiction to determine fitness and as to authority to set up an independent board of physicians for such purpose.

[fol. 148]

EXHIBIT A

"STATEMENT OF CLAIM: "Request for reinstatement of Engineer F. J. Gunther to service with all seniority rights inimpaird and pay for all time lost account of physical disqualified and taken out of service December 30, 1954.

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claim of engineer for reinstatement in service and pay for time lost. Shortly after his 71st birthday claimant was disqualified from service by the chief surgeon on the basis of a physical examination by a company physician at Los Angeles. Upon his request he was then sent to the Southern Pacific General Hospital at San Francisco and there examined by carrier's medical superintendent following which the chief surgeon determined that he should not be returned to service.

Thereupon claimant went for examination to a recognized specialist at San Diego and on the basis of his report requested that a three doctor board be appointed to reexamine his physical qualification for return to service.

Upon denial of this request claim for reinstatement and back pay was filed in this Division resulting in Award 17 161 in which the claim was dismissed without prejudice on the ground that there was no showing whether or not claimant's physician and the company physicians disagreed as to claimant's physical qualifications. Now the claim has been progressed again with the inclusion of further statement by claimant's physician.

Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appoint-

ment of a neutral medical board as here sought and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.

It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employee to remain in service. It is true also that the employee has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that [fol. 149] it has jurisdiction to determine whether the employee has wrongfully been deprived of service.

If carrier through its medical staff has removed an employee from service in good faith, on the basis of a fair standard of fitness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

Since determination of the facts necessary to enable the Division to make proper award on such issue requires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by carrier and one by the employee and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians.

While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians.

If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be

denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians.

AWARD: Claim disposed of per Findings.

Dated at Chicago, Illinois
this 2nd day of October, 1956."

[fol. 150]

EXHIBIT B

"INTERPRETATION

This docket presents claim previously before this Division with the present Referee sitting as a Member, which resulted in Award 17 646. As appears therein claimant had been held by carrier's chief surgeon to be no longer physically qualified to remain in service and the Division determined that there was sufficient disagreement as to claimant's physical condition to justify inquiry and finding by a board of three physicians, as not unusually required. It was declared that if the decision of the majority of such board should support the decision of carrier's chief surgeon the claim would be denied; if not, it would be sustained with pay pursuant to rule on the property, from October 15, 1955.

On June 30, 1958 claimant filed with the Division a supplemental submission setting out that following said award a board of three physicians had been agreed on and established as provided for therein, and that the findings and decision of the majority of said board did not support the decision of carrier's chief surgeon but found that claimant had no physical defect which would prevent him from carrying on his usual occupation, but that carrier advised claimant that "the findings of the three doctor board have been reviewed by the chief surgeon and interpreted to be such that you should not be returned to duty", and refused to reinstate claimant or pay him for time lost. Wherefore

claimant sought a new or supplemental award or an interpretation, to make absolute his right to reinstatement and pay for time lost.

Carrier now requests permission to file an answer to petitioner's submission and asserts that the Referee has authority to resolve any question of procedure in the matter before him. Claimant's submission was filed more than ninety days before the request without any request appearing for extension of time. In the meantime the Division deadlocked on the disposition of the dispute and it was submitted to the National Mediation Board which appointed a Referee; then the docket was given the Referee for study and thereafter on the day the matter came on for oral argument carrier made its request for permission to file answer. Even then no answer was tendered or time suggested when one might be prepared. In such situation, if the Referee has such authority as urged by carrier representatives permission would be denied.

We find from the record that the statements set out in claimant's submission are true; that a board of three physicians was selected by agreement of the parties for the purpose of determining claimant's physical qualification for [fol. 151] service; that the majority of said board properly examined claimant and that their findings and decision therefrom did not support the decision of carrier's chief surgeon but that they found and decided that claimant had no physical defects which would prevent him from carrying on his usual occupation as engineer.

The issue of fact upon which the prior Award 17 646 was conditioned having been determined in favor of claimant, said conditional award should be made absolute and final and the claim sustained as therein provided.

AWARD: Claim sustained for reinstatement with pay for all time lost from October 15, 1955 pursuant to rule on the property.

Dated at Chicago, Illinois
this 8th day of October, 1958."

[fol. 152]

"ARTICLE 35.**SENIORITY.**

"Section 1. Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as engineer.

"Sec. 2. Under consolidation of the San Diego & Arizona Railway and the San Diego and Southeastern Railway all engineers retain their seniority over lines on which they were employed prior to January 1st, 1918. Their system seniority will date from January 1st, 1918, date of consolidation.

"Sec. 3. (a) The Company will not assign any more engineers to each district or run than is necessary to move the traffic with promptness.

"(b) Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment."

• • • • •

ARTICLE 38.**REDUCTION OF FORCE.**

"Section 1. (a) When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off, may, if they so elect, displace any fireman their junior on their seniority district.

Engineers Cut Off List.

"(b) When hired engineers are laid off account of reduction in service, they will retain all seniority rights; provided they return to actual service within thirty days from the date their services are required."

"ARTICLE 47.

INVESTIGATIONS.

"Section 1. (a) No engineer shall be suspended or discharged, except in serious cases, where fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials. During such hearing he may be assisted by an engineer in service on his seniority district. When decision is rendered, if such engineer believes it unjust, he may take up his own case on appeal to the higher authorities and, if he so desires, may select an engineer in service on the same seniority district to assist him in presenting his case, but such representation shall be of a purely personal character, and shall not carry with it the sanction of committee representation. No adjustment made by the Company in such cases shall be construed or cited as precedent in any case presented by the Engineers' Committee.

"(b) If an engineer does not handle his own case, as above specified, the regularly constituted committee of the Brotherhood of Locomotive Engineers can appeal through the proper officials to the highest authority; hearing in all cases to be given and decision rendered promptly as possible.

"(c) In all cases where a formal investigation is held, the engineer under investigation will be entitled to representation by the Local Chairman of his organization or by any employe of the same grade in actual service on the engineer's seniority district.

"Interrogations will be made by the Superintendent or his representative who is holding the investigation. After he has completed the direct examination, officers of the Company who may be attending the investigation will be allowed to interrogate the witness.

"If the engineer's representative desires to ask any questions pertaining to the case of the man represented, he will be allowed that privilege.

"Where charges are made regarding engineers, same must be in writing.

"No demerits will be charged against an engineer's record without giving him an opportunity for defense and allowing him to present his side of the case.

"If the Chairman of the Local Committee requests a transcript of the testimony in an investigation that has been made, it will be furnished.

"NOTE: It is understood the above rules cannot be construed to have been properly observed unless the engineer and/or his representative are confronted with all the charges and evidence and provided with a copy of transcript of all evidence.

[fol. 154] "Section 1 (d) If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid \$8.79 per day for time lost on such account."

[fol. 155]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459-SD-W

F. J. GUNTHER, Petitioner,

v.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY,
a corporation, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT—October 27, 1961

Defendant having filed a motion for summary judgment herein, and both parties having presented briefs and argument, and the Court having submitted the motion, and having considered the pleadings, the findings and awards of the National Railroad Adjustment Board, First Division,

[File endorsement omitted]

and the affidavits and exhibits on file with reference to such motion, and having filed its written opinion herein, now makes its findings of fact, conclusions of law and judgment:

Findings of Fact

1

Defendant at all times pertinent to this action was and now is a corporation organized and existing pursuant to the laws of the State of Nevada, and was and now is a carrier by railroad subject to the Interstate Commerce Act.

[fol. 156]

2

Petitioner was employed by defendant on December 18, 1916 as a fireman and was promoted to locomotive engineer on December 4, 1923, and was so employed by defendant until December 30, 1954.

3

On December 30, 1954, after examinations by defendant's physicians and a finding that plaintiff was physically disqualified from active service, plaintiff was, by defendant, removed and retired from the service of defendant.

4

On December 30, 1954 and at all times pertinent to this action, there was in effect a collective bargaining agreement between plaintiff and defendant's Union, Brotherhood of Locomotive Engineers. A copy of said agreement is on file, and is Exhibit "A" to the affidavit of K. K. Schump filed by the defendant on November 28, 1960.

5

Plaintiff requested that he be reinstated to active service, and upon denial of his request, filed a claim for reinstatement with the First Division of the National Railroad Adjustment Board.

6

On October 2, 1956, the First Division of the National Railroad Adjustment Board considered plaintiff's claim, found that it had jurisdiction to determine whether the plaintiff had wrongfully been deprived of service, and over defendant's protest that the Board lacked authority to review the decision of its chief surgeon, and that there was no rule permitting the appointment of a board of physicians [fol. 157] to determine the facts as to claimant's disability and the propriety of his removal from service, ruled that a board of physicians should be appointed, one member by the plaintiff, one member by the defendant, and a third by the two so selected. The Board further ruled that if the decision of the majority of such board of physicians should support the decision of the carrier's chief surgeon the claim of plaintiff would be denied; if not, the claim would be sustained with pay pursuant to the rule on the property from October 15, 1955.

7

A board of physicians was selected as provided by the Railroad Adjustment Board, and said physicians made their respective reports.

8

On October 8, 1958 the First Division of the National Railroad Adjustment Board ruled that the findings of the majority of said Board of physicians did not support the decision of carrier's chief surgeon, and made an award and order that defendant reinstate plaintiff with pay for all time lost from October 15, 1955.

9

The defendant refused to comply with the award and order of the National Railroad Adjustment Board, and on September 26, 1960, plaintiff filed this action to enforce said order of said Board.

10

At all times pertinent to this action said collective bargaining agreement hereinbefore referred to contained no provision limiting the right of defendant to remove and retire plaintiff from active service upon a finding by defendant's physicians that plaintiff was physically disqualified [fol. 158] from active service.

11

At all times pertinent to this action said collective bargaining agreement hereinbefore referred to contained no provision for a board of physicians to review the findings of defendant's physicians as to physical disqualification of its employees.

Conclusions of Law

The Court Concludes:

1.

The Court has jurisdiction of the subject matter of this action and of the parties hereto.

2.

At all times pertinent to this action the defendant had the right to remove and retire plaintiff from active service upon a finding by its physicians that plaintiff was physically disqualified from such service.

3.

At all times pertinent to this action there was not in effect any agreement between defendant and plaintiff's union limiting the right of plaintiff mentioned in Paragraph 2.

4.

The action of plaintiff in removing and retiring plaintiff from active service upon a finding by its physicians that

plaintiff was physically disqualified from such service violated no provision of any agreement in effect between defendant and plaintiff's union.

5.

The award of the First Division, National Adjustment Board, dated October 8, 1958, here sought to be enforced [fol. 159] is erroneous and should be set aside.

6.

The pleadings, admissions and affidavits on file show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

Judgment

It Is Ordered:

The motion for summary judgment of defendant is granted.

The award of the First Division, National Adjustment Board dated October 8, 1958 is set aside.

Defendant shall have its costs.

Dated this 27th day of October, 1961.

Jacob Weinberger, United States District Judge.

Copies to:

Gostin & Katz, Attorneys for Petitioner, 725 U. S. Grant Hotel, San Diego 1, California;

Gray, Cary, Ames & Frye, James W. Archer, Eugene L. Freeland, Attorneys for Defendant, 1410 Bank of America Building, San Diego 1, California.

[fol. 168]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
No. 2459 SD-W

[Title omitted]

NOTICE OF APPEAL—Filed November 27, 1961

Notice is hereby given that F. J. Gunther, petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 27, 1961.

Dated: November 22, 1961.

Hildebrand, Bills & McLeod, Charles W. Decker, By
Charles W. Decker, Attorneys for Petitioner.

[fol. 169] Proof of Service by Mail (omitted in printing).

[fol. 174]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
No. 2459 SD-W

[Title omitted]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS
TO RELY ON APPEAL—Filed February 1, 1962

To Appellee, San Diego & Arizona Eastern Railway
Company, and to Its Attorneys:

Pursuant to Rule 75 (d), Federal Rules of Civil Procedure, Petitioner and Appellant hereby designates the following as the points upon which he intends to rely on appeal.

[File endorsement omitted]

(a) That the District Court erred in concluding that the pleadings, admissions and affidavits on file show there is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law. (Conclusion of Law #6)

(b) That the District Court erred in concluding as a matter of law that the applicable collective bargaining agreement was without ambiguity on the question of the right of defendant to remove and retire plaintiff from active service upon a finding by its physicians that plaintiff was physically disqualified from such service and that, therefore, plaintiff was precluded from resorting to evidence extrinsic to said collective bargaining agreement for [fol. 175] the purpose of clarifying such ambiguity and establishing his right to remain in active service and employment so long as he was, in fact, physically qualified to perform the services required of a locomotive engineer by defendant. (Opinion of the District Court dated September 27, 1961, page 20)

(c) That the District Court erred in concluding as a matter of law that the National Railroad Adjustment Board, First Division, exceeded its jurisdiction in holding that it had jurisdiction to determine whether an employee has wrongfully been deprived of service and in establishing an impartial board of examining physicians to determine plaintiff's physical fitness to continue in active service as a means of exercising that jurisdiction. (Opinion of the District Court dated September 27, 1961, pages 28-29).

(d) That the District Court erred in finding that the applicable collective bargaining agreement contained no provision limiting the right of defendant to remove and retire plaintiff from active service upon a finding by defendant's physicians that the plaintiff was physically disqualified from active service. (Findings of Fact #10)

(e) That the District Court erred in concluding that at all times pertinent to this action the defendant had the right to remove and retire plaintiff from active service upon

a finding by its physicians that plaintiff was physically disqualified from such service. (Conclusion of Law #2)

(f) That the District Court erred in concluding that at all times pertinent to this action there was not in effect any agreement between defendant and plaintiff's union limiting the right of defendant to remove and retire plaintiff from active service upon a finding by defendant's physicians that plaintiff was physically disqualified from such service. (Conclusion of Law #3)

[fol.176] (g) That the District Court erred in concluding that the action of defendant in removing and retiring plaintiff from active service upon a finding by its physicians that plaintiff was physically disqualified from such service violated no provision of any agreement in effect between defendant and plaintiff's union. (Conclusion of Law #4)

(h) That the District Court erred in concluding that the award of the First Division, National Adjustment Board, dated October 8, 1958, sought to be enforced in this action is erroneous and should be set aside. (Conclusion of Law #5)

Dated: San Francisco, California, January 30, 1962.

Hildebrand, Bills & McLeod, Charles W. Decker, By
Charles W. Decker, Attorneys for Petitioner and
Appellant, F. J. Gunther.

[fol.177] Proof of Service by Mail (omitted in printing).

• • • • •

[fol. 182]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil Docket

JURY

Jury demand date: 4-24-61

2459-SD-W

F. J. GUNTHER, Petitioner,

—VS.—

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY,
a corporation, Respondent.

For plaintiff:

Hildebrand, Bills & McLeod, 1212 Broadway, Oakland
12, Calif., GL 1-6732.

[fol. 182½]

2459-SD-W

DOCKET ENTRIES

DATE	PROCEEDINGS
9/26/60	Fld petn to enforce award & ord of Nat'l RR adjustment Board. Sums mailed to atty in San Francisco. Md JS-5.
11/15/60	Fld sums svd as to each deft.
11/28/60	Fld not of mot & mot for summy judgt noticed for 12/14/60 2 PM. Fld memo of pts & auths. Fld affid K. K. Schomp. Lodged judgt.
12/ 2/60	Fld ord for con't from 12/14/60 to 12/19/60, 10 am for hrg mot for summy Judgm (W). Fld supplemental affid of K.K. Schomp.
12/12/60	Fld petnr's memo in oppos to mot for summy judgmt.

DATE	PROCEEDINGS
12/19/60	At req of counsel, ord submitted w/o argument (W).
3/27/61	Ent ord deft mot for summary jdgmt as to grounds labelled 1 & 11 is denied. Copies sent to counsel. (Fld courts memo opinion (W)
4/10/61	Fld ord allowing deft up to & including 4/24/61 in which to ans or move fur in response to petn on file (W)
4/24/61	Fld ans of deft. Fld demand for Jury Trial.
5/ 9/61	Fld assoc of attys & ord thereon (W).
5/16/61	Fld not of mot & mot for summy jdgmt, notice for 5/29/61, 2 P.M. Fld affid of K. K. Schomp. Fld memo of pts & auths. Fld proposed findgs of fact and cone of law. LODGED proposed jdgmt.
5/29/61	Fld petners memo in oppos to mot for smmy jdgmt. Fld petnrs affid in oppos to mot for summy jdgmt. Hrg mot for summy jdgmt & settg for P/T & settg for Trial. Both sides argue Ord cont to 7/3/61, 10 A.M. for fur procs or submssn (W).
6/26/61	Ent ord fur proceedngs or submission in the above-entitled matter is cont to 7/21/61, 10 A.M. (W). Copies to counsel.
7/21/61	Ord matter submitted (W)
9/28/61	Filed opinion (W). Ent min ord that within 10 days deft will srv findgs, con of law and jdgmt in conformity with opinion; petnr may have 5 days after srv file objects as to form only (W)
10/27/61	Fld order granting defts motion for summary judgment, that award of First Division, National Adjustment Board dated 10-8-58 is set aside,

DATE	PROCEEDINGS
	and awarding defts costs. (W) (Ent 10-27-61 and not attys) JS-6
10/30/61	LODGED proposed findings of fact, conclusions of law & jdgmt.
11/ 6/61	Fld. not of ent of jdgmt
11/27/61	LODGED & Fld Not of Appeal LODGED & Fld stip & waiver re bond for costs on appeal & ord thereon (W)
1/ 4/62	Fld ord extending time for flg record or appeal to 2/25/62 & Docketing Appeal (W)
2/ 1/62	Fld designation of portions of the record to be contained in record on appeal Fld statements of pts on which appellant intends to rely on appeal.
2/ 8/62	Fld appellee's designtn of portns of recrd to be contained in the record on appeal

[fol. 184]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
No. 2459 SD-W

[Title omitted]

NOTICE OF MOTION FOR RELIEF FROM FINAL JUDGMENT (RULE 60(b), FEDERAL RULES OF CIVIL PROCEDURE)—Filed June 5, 1962

To Defendant San Diego & Arizona Eastern Railway Company and Its Attorneys:

Please Take Notice that on June 25, 1962, at 2:00 P. M. of said day, Petitioner F. J. Gunther, at the courtroom

[File endorsement omitted]

of the above entitled court located in the United States Custom House and Court House Building, San Diego 1, California, will move the Court to set aside its judgment heretofore entered on October 27, 1961 upon the following grounds:

1. Mistake, inadvertence, surprise or excusable neglect;
2. Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; and
3. For other reasons justifying relief from the operation of said judgment.

Said motion will be made pursuant to the authority of Rule 60(b) of the Federal Rules of Civil Procedure and [fol. 185] will be based upon this notice, the points and authorities set forth below, the affidavits of J. P. Colyar, F. J. Gunther and Charles W. Decker, filed and served herewith, and evidence, both oral and documentary, to be adduced at the hearing of said motion.

Dated: June 4, 1962.

Hildebrand, Bills & McLeod, Clifton Hildebrand,
Charles W. Decker, By Charles W. Decker, At-
torneys for Petitioner.

Points and Authorities

1. Rule 60 (b), Federal Rules of Civil Procedure confers upon the court discretion to relieve a party or his legal representative from a final judgment upon the ground of mistake, inadvertence, surprise or excusable neglect, or newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial, or for any other reason justifying relief from the operation of the judgment.

2. This court has jurisdiction to entertain a motion for relief from final judgment despite the pendency of the appeal therefrom.

Binks v. Ransburg Electro-Coating Corp., 7 Cir. 1960, 281 F. 2d 252, 260-261, cert. granted 81 S. Ct. 353, 364 U.S. 926, cert. dismissed 81 S. Ct. 1091, 366 U.S. 211

3. Any doubt as to whether in the court's discretion a motion to open a judgment should be granted is resolved in the movant's favor.

U. S. v. Small, D.C.N.Y. 1959, 24 F.R.D. 429

[fol. 186] Proof of Service by Mail (omitted in printing).

[fol. 187]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
No. 2459 SD W

[Title omitted]

AFFIDAVIT OF J. P. COLYAR—Filed June 5, 1962

State of California,
City and County of San Francisco, ss.

J. P. Colyar, being duly sworn, deposes and says:

I make this affidavit in support of the motion of petitioner, F. J. Gunther, to be relieved from the operation of the judgment of this Court heretofore made and entered on October 27, 1961.

If called as a witness, I would be competent to testify as follows:

I am the Chairman, General Committee of Adjustment, Brotherhood of Locomotive Engineers, for the Southern Pacific Company (Pacific Lines), the former El Paso & Southwestern System, the Northwestern Pacific Railroad

[File endorsement omitted]

Company, the San Diego & Arizona Eastern Railway Company, the Oregon, California and Eastern Railway Company, and the Southern Pacific Railway Company of Mexico. I have been employed in said capacity by the Brotherhood of Locomotive Engineers since August 22, 1947.

In said capacity it has been and now is my responsibility to negotiate with all of said railroad carriers with respect [fol. 188] to terms and conditions of employment of locomotive engineers in the employ of said carriers and to adjust claims and grievances arising under existing collective bargaining agreements between said carriers and the Brotherhood of Locomotive Engineers.

At all times since a date prior to March 1, 1935, the Brotherhood of Locomotive Engineers has been the railway labor organization designated by the National Railroad Mediation Board to represent locomotive engineers employed by the Southern Pacific Company and, also, by its wholly owned subsidiary, the San Diego & Arizona Eastern Railway Company, for purposes of collective bargaining and settlement of disputes arising under collective bargaining agreements with said carriers. At all of said times there has been in existence a collective bargaining agreement between the Southern Pacific Company and the Brotherhood of Locomotive Engineers representing the locomotive engineer employees of that company (hereinafter referred to as the SP-BofLE agreement), and a collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers representing locomotive engineer employees of that company (hereinafter referred to as the SD&AE-BofLE agreement). I am thoroughly familiar with all of the contractual provisions contained in both such agreements and the interpretation and application thereof in the day-to-day relationships between said companies and their locomotive engineer employees.

Said agreements have been evidenced by printed booklets containing the terms thereof as of the date of printing, together with written memoranda principally in the form of correspondence between the parties thereto evidencing changes in and additions to the terms of said agreements

effected subsequent to such printing. It is not customary in the railroad industry to print a new booklet each time the contracting parties agree to some modification to the existing agreement whether such modification is in the form of elimination of an existing provision, change in an existing provision, or addition of a new provision. Instead, such modifications are evidenced by exchanges of correspondence between the contracting parties and other such written memoranda.

The SD&AE-BofLE agreement of March 1, 1935, as revised on November 30, 1938, was reduced to printed booklet form. The green-covered booklet submitted to this court as Exhibit "A" to the affidavit of K.K. Schomp filed herein on November 28, 1960 is one of such booklets. Said booklet, as printed, contained all of the terms of the SD&AE-BofLE agreement as of November 30, 1938. However, following November 30, 1938 and prior to the printing of a new booklet containing the terms of said agreement as of January 1, 1956, there were many modifications, including additions, thereto. One such addition, the provision for adjustment of disputes between the carrier and employee as to the employee's physical fitness for performance of his duties as locomotive engineer by the establishing of a three-physician panel to make said determination, resulted from the following.

As of November 30, 1938 the SP-BofLE agreement and the SD&AE-BofLE agreement contained identical provisions relating to the right of engineers assigned to regular runs to be paid for time lost through no fault of their own. The provision was Article 12, Section 1 of the SP-BofLE agreement and Article 9, Section 1 of the SD&AE-BofLE agreement. It read as follows:

"When, from any cause, more engineers are assigned to a certain run than can (per actual mileage of said run) make full time at the standard pay for service and division on which such runs occur, mileage in excess of actual miles run will be allowed sufficient to give such engineers full time. Full time as herein referred to shall be understood to mean 100 miles at the

standard rate for the district and service for each engineer assigned to the run for each day per week that the train, or trains are scheduled to run, but in no case under the provisions of this Article shall an engineer receive less than full pay for six days per week, provided engineer is available for service on assigned or other runs. This Article shall in no way apply to runs, the daily number of trains composing which are uncertain."

As a result of an interpretation placed upon Article 12, [fol. 190] Section 1 of the SP-BofLE agreement by the National Railroad Adjustment Board, First Division, in Awards 4296, 4297, 4298 and 4299, the parties to the SP-BofLE agreement added Article 12, Section 1(c) to their agreement. It read as follows:

"Engineers assigned to regular runs, who through no fault of their own are not used thereon and their runs are worked in whole or in part, will be allowed the full mileage of their assignments."

Thereafter, by an exchange of letters between the parties to the SD&AE-BofLE agreement, culminating with a letter dated January 4, 1945 from H. R. Gernreich, Vice President and General Manager, San Diego & Arizona Eastern Railway Company, to P. O. Peterson, General Chairman, Brotherhood of Locomotive Engineers, it was agreed between the parties to the SD&AE-BofLE agreement that interpretations placed upon provisions of the SP-BofLE agreement would be applicable to similarly worded provisions of the SD&AE-BofLE agreement. In addition, by said exchange of correspondence, a new provision, Article 9, Section 1(c), was added to the SD&AE-BofLE agreement identical to the above-quoted Article 12, Section 1(c) of the SP-BofLE Agreement.

Attached hereto, marked Exhibits A, B, C, D, E, F, G, H, I and J, are true copies of the items of correspondence which affected said modifications of the SD&AE-BofLE agreement, which said exhibits are here referred to and,

by such reference, incorporated herein as though here set forth in full.

Thereafter, on November 13, 1947, as a result of a dispute arising under Article 12, Section 1(c) of the SP-BofLE agreement quoted above, the parties to that agreement placed an interpretation upon said Article 12, Section 1(c) covering disputes arising out of time lost from regularly assigned runs by engineers because of the necessity for taking periodic physical examinations and because of removal from active service by the company upon the [fol. 191] ground of physical disqualification. Said interpretation specifically provides for resolution of disputes between company and its regularly assigned engineers as to physical fitness for duty through use of a three-physician panel. It is evidenced by letters of October 2, 1947 and November 13, 1947 of H. R. Hughes, Assistant General Manager, and C. M. Buckley, Assistant Manager of Personnel, Southern Pacific Company, the first addressed to H. C. Hobart, Assistant Grand Chief Engineer and to affiant, General Chairman, Brotherhood of Locomotive Engineers, and the second addressed to W. G. Burbank, Asst. Grand Chief Engineer, Brotherhood of Locomotive Engineers. Attached hereto, marked Exhibits K and L, are true copies of said letters, which said exhibits are here referred to and by such reference incorporated herein as though here set forth in full.

By reason of the foregoing, since November 13, 1947 and to and including December 30, 1954, the date Mr. F. J. Gunther was removed from service by the San Diego & Arizona Eastern Railway Company, the SD&AE-BofLE agreement contained a provision whereby, in the event a SD&AE engineer was removed from service on account of his physical condition by the company and the engineer desired the question of his physical ability to conform to prescribed physical standards to be further investigated and determined, a special panel of physicians consisting of one doctor selected by the company, one doctor selected by the employee, and a third doctor selected by the two so appointed, was to examine the employee and the report of

such panel accepted as determinative of the employee's physical fitness to continue in service.

Said provision relating to a three-physician panel to resolve disputes as to the physical fitness of engineer employees remained in the form shown on Exhibits K and L hereto until December 1, 1959 when it was changed as a [fol. 192] result of the following.

On August 28, 1959 affiant requested that the language of said provision be modified. Said request, marked Exhibit M, is attached hereto and, by reference, incorporated herein as though here set forth in full. Affiant's purpose in making said request was not to add a new provision to the existing agreements referred to in said request, it was to clarify and make more explicit the existing provision as set forth in exhibits K and L hereto, and affiant so advised the representatives of defendant and the Southern Pacific Company who entertained, and subsequently acceded to, said request. Said request was granted by letter, with enclosures, of L. M. Fox, Jr. of the personnel department, Southern Pacific Company, dated November 4, 1959 and addressed to affiant. True copies of said letter and enclosure, marked Exhibits N and O, are attached hereto and, by reference, incorporated herein as though here set forth in full.

J. P. Colyar

Subscribed and sworn to before me this 1st day of June, 1962.

Alice L. O'Connor, Notary Public, In and for the City and County of San Francisco, State of California. My Commission Expires April 17, 1964.

[fol. 193]

EXHIBIT A TO AFFIDAVIT OF J. P. COLYAR

June 3, 1944

Mr. H. R. Gernreich
Vice President and General Manager
San Diego & Arizona Eastern Ry. Co.
277 Pacific Electric Building
Los Angeles 14, California

E-10386-68

Dear Sir:

Please be referred to Article 7, Engineers' Agreement, regarding work train and wrecking service. Said rule was taken from the Southern Pacific Engineers' Agreement, Articles 8 and 8½, and in order that the SD&AE Engineers' Agreement may conform with the Southern Pacific Engineers' Agreement, we are asking that the following portion of Section 3(b), Article 8, Southern Pacific Engineers' Agreement, be added to Section 3(b), Article 7:

"Engineers deadheaded to an outside point to inaugurate service on an extra or unassigned work train, will be paid deadhead mileage under the provisions of Article 24, and will commence work train day at the time of arrival at such outside point in deadhead service."

We also ask that Article 9 be brought up to date with SP Article 12 (the latter as the result of settlements and Board Awards) by making Section 1(b), (c) and (d) of Article 12, reading:

"(b) Engineers assigned to regular runs, who through no fault of their own are not used thereon account runs not operated in whole or in part, will be paid 100 miles at rate applying on locomotive on which last used for each day runs are scheduled or bulletined to operate.

(c) Engineers assigned to regular runs, who through no fault of their own are not used thereon and their

runs are worked in whole or in part, will be allowed the full mileage of their assignments.

(d) Engineers assigned to regular runs or pool freight service, called at the instance of the company for service not included in their assignment, thus causing them to miss their regular run or turn, will be separately paid for each date on which earnings in other service does not equal earnings of assignment, not less than earnings of their assignment."

Section 1(b), (c) and (d) of Article 9, SD&AE Agreement.

[fol. 194] We also ask that Article 15 be brought up to date to conform to SP Article 19 by adding Notes 1 and 2 following Section 2, Article 19 as Notes 1 and 2 following Section 1(b), Article 15, SD&AE Engineers' Agreement. Said Notes read:

"NOTE (1): Engineers brought on duty in advance of the time specified in bulletin of assignment will be allowed a minimum of 100 miles for each time used, in addition to earnings of assignment. In each case rates and rules covering service performed will govern.

NOTE (2): Engineers brought on duty subsequent to time specified in bulletin of assignment will be paid from time specified in bulletin of assignment."

Your consideration will be appreciated.

Yours truly,

/s/ P. O. PETERSON

POP:JM

cc—Mr. L. D. Salisbury
Mr. C. C. Cummins

[fol. 195]

EXHIBIT B TO AFFIDAVIT OF J. P. COLYAR

[Stamp—Received Jun 9 1944—P. O. Peterson]

**SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY**

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

**H. R. GERNREICH
VICE PRESIDENT AND
GENERAL MANAGER**

DTB SD&AE/013-223 (Genl)

June 8, 1944

**Mr. P. O. Peterson
General Chairman—B.L.E.
840 Pacific Building
San Francisco, 3, Calif.**

Dear Sir:

Please refer to your letter of June 3, file E-10386-68, which has reference to Article 7, Article 9, and Article 15, San Diego & Arizona Eastern Engineers' Agreement.

I will give you my decision in this case as promptly as possible.

Yours truly,

/s/ H. R. GERNREICH

[fol. 196]

EXHIBIT C TO AFFIDAVIT OF J. P. COLYAR

[Handwritten Note—Confes—L.A.—9/23/44—Will think it over]

[Stamp—Received—Sep 22 1944—P. O. Peterson]

SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

H. R. GERNREICH
VICE PRESIDENT AND
GENERAL MANAGER

File: DTB SD&AE E&F 2-3

September 21, 1944

Mr. P. O. Peterson
General Chairman—B.L.E.
840 Pacific Building
San Francisco, 3, Calif.

Dear Sir:

Please refer to your letter of June 3, file E-10386-68, on which you request that certain changes and additions be made in Engineers' Agreement.

You request that the following be added to Article 7, Section (b), Engineers' Agreement:

"Engineers deadheaded to an outside point to inaugurate service on an extra or unassigned work train, will be paid deadhead mileage under the provisions of Article 24, and will commence work train day at the time of arrival at such outside point in deadhead service."

I am not agreeable to adding the above to Article 7, Section (b), Engineers' Agreement.

You request that the following be added to Article 9 as Section 1(b), (c) and (d), Engineers' Agreement:

"(b) Engineers assigned to regular runs, who through no fault of their own are not used thereon account runs not operated in whole or in part, will be paid 100 miles at rate applying on locomotive on which last used for each day runs are scheduled or bulletined to operate.

"(c) Engineers assigned to regular runs, who through no fault of their own are not used thereon and their runs are worked in whole or in part, will be allowed the full mileage of their assignments.

"(d) Engineers assigned to regular runs or pool freight service, called at the instance of the company [fol. 197] for service not included in their assignment, thus causing them to miss their regular run or turn, will be separately paid for each date on which earnings in other service does not equal earnings of assignment, not less than earnings of their assignment."

I am agreeable to adding the first paragraph, (b), as Section 1(b), Article 9, Engineers' Agreement.

I am not agreeable to adding the second paragraph, (c), as Section 1(c), Article 9, Engineers' Agreement.

I am not agreeable to adding the third paragraph, (d), as Section 1(d), Article 9, Engineers' Agreement, however, I am agreeable to adding the following as Section 1(c), Article 9, Engineers' Agreement, to become effective upon reaching an understanding showing the work that may be included in the various assignments:

"Engineers assigned to regular runs or pooled freight service, called at the instance of the Company for service not included in assignment, thus causing them to miss their regular run or turn, will be paid not less than the earnings of their assignment for other service performed."

You request that the following notes be added to Article 15, Engineers' Agreement:

"NOTE (1): Engineers brought on duty in advance of the time specified in bulletin of assignment will be allowed a minimum of 100 miles for each time used, in addition to earnings of assignment. In each case rates and rules covering service performed will govern."

NOTE (2): Engineers brought on duty subsequent to time specified in bulletin of assignment will be paid from time specified in bulletin of assignment."

I am agreeable to adding Note (1) to Article 15, Engineers' Agreement, provided its provisions will not apply when it is necessary to readvertise, account change in starting time, roustabout assignments before they have been in existence six days, also with the understanding that the phrase, "each time used" is construed to include total time, regardless of the number of trips that may be made or the [fol. 198] nature of work performed, between the time an engineer is required to report for duty in advance of the advertised starting time and the advertised starting time of the assignment.

I am not agreeable to adding Note (2) to Article 15, Engineers' Agreement.

Yours truly,

/s/ H. R. GERNREICH

[fol. 199]

EXHIBIT D TO AFFIDAVIT OF J. P. COLYAR

[Stamp—Received—Sep 27 1944—P. O. Peterson]

SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

H. R. GERNREICH,
VICE PRESIDENT AND
GENERAL MANAGER

DTB SD&AE 013-223 (Genl)

September 25, 1944

Mr. P. O. Peterson
General Chairman—B.I.E.
840 Pacific Building
San Francisco, 3, Calif.

Dear Sir:

Please refer to your letter of September 18 listing four cases you wished to discuss with me in conference, case No. 4 being as follows:

"4. E-10386-68 DTB SD&AE/013-223 (Genl)"

The contents of your letter of June 3 was discussed with you in conference in my office at Los Angeles September 23. During that discussion you stated that at the time the current Engineers' Agreement on the San Diego & Arizona Eastern Railway Co. was entered into Mr. Annable, who was then President and General Manager, advised you that if the proposed agreement were to be worded the same as the then current Pacific Lines Engineers' Agreement he desired to have the interpretations etc. made on the then current Pacific Lines Engineers' Agreement applied to the

proposed SD&AE Engineers' Agreement. You also advised that Mr. Annable wrote you stating that the interpretations etc. made on Pacific Lines Engineers' Agreement would be applicable to the SD&AE Engineers' Agreement.

I advised you that I did not know that that was the case, if it is, and that before the contents of your letter of June 3, 1944, was definitely determined I would endeavor to secure a copy of the letter you stated Mr. Annable wrote you and that if necessary, I would ask you to furnish a copy thereof.

I will endeavor to get a copy of that letter from Mr. Lamey and if I am not successful I will then make a request upon you for a copy thereof, after which I will give you a definite reply to your letter of June 3, 1944. In the meantime I will hold my letter of September 21 in abeyance, to be supplemented with a definite reply, after copy of the aforementioned letter is secured.

Yours truly,

/s/ H. R. GERNREICH

[fol. 200]

EXHIBIT E TO AFFIDAVIT OF J. P. COLYAR

[Stamp—Received—Oct 23 1944—P. O. Peterson]

SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

H. R. GERNREICH,
VICE PRESIDENT AND
GENERAL MANAGER

DTB SD&AE 013-223 (Genl)

October 20, 1944

Mr. P. O. Peterson
General Chairman—B. L. E.
840 Pacific Building
San Francisco, 3, Calif.

Dear Sir:

Please refer to my letter of September 21, file DTB SD&AE E&F 2-3, which has reference to your letter of June 3, file E-10386-68, in which you request certain changes and additions be made in SD&AE Engineers' Agreement.

Also refer to my letter of September 25, file DTB SD&AE 013-223 (Genl), in which I advised you that I would endeavor to secure from Mr. Lamey a copy of the letter you stated you had received from Mr. Annable that the interpretations etc. made on the Pacific Lines Engineers' Agreement would be applied to the SD&AE Engineers' Agreement.

Mr. Lamey was unable to locate such a letter, therefore, as I mentioned to you in conference in my office September 23, and as mentioned in the third paragraph of my letter of September 25, I will appreciate your furnishing me a copy thereof.

Yours truly,

/s/ H. R. GERNREICH

[fol. 201]

EXHIBIT F TO AFFIDAVIT OF J. P. COLYAR

November 10, 1944

E-10386-68

DTB SD&AE 013-223

(Genl)

Mr. H. R. Gernreich
Vice President and General Manager
San Diego & Arizona Eastern Railway Company
277 Pacific Electric Building
Los Angeles 14, California

Dear Sir:

Referring to your letters September 25 and October 20, 1944, involving the rules proposed in our letter to you June 3, 1944, which rules were taken from the Southern Pacific Engineers' Agreement.

In conference with you September 23 I pointed out that the SD&AE Agreement was copied from the Southern Pacific Engineers' Agreement, except where otherwise noted, and that the application of the rules on the Southern Pacific would apply to the engineers on the SD&AE. I further stated that I believed we had a letter from Mr. Annable, with whom we negotiated the Agreement.

This is to advise that I have not located said letter, but I want to restate that when we negotiated the Agreement with Messrs. Annable and McIntyre it was clearly understood that whatever application of a rule was made on the Southern Pacific, said application would apply on the SD&AE in cases where the rules read alike.

The requested rules contained in our letter to you June 3, 1944 are all contained in the Southern Pacific Engineers' Agreement. At the time the SD&AE Engineers' Agreement was written we only had Section 1(a) of Article 12 of the present Southern Pacific Engineers' Agreement in force.

Section 1(b), (c) and (d) of SP Article 12 is the result of Board Awards where the Board sustained claims based on the former Article 12 which is identical to Article 9 of the SD&AE Agreement. The same applies to Notes 1 and 2 which we suggested be added to Article 19.

With reference to our suggested addition to Article 7 which was taken from a portion of Section 3(b), Article 8, SP Engineers' Agreement: As explained to you in conference, that proposal was a compromise reached on the Southern Pacific and without it continuous time would be paid at the highest rate.

[fol. 202] I am sure you will agree that where the Articles of the Agreements read alike it would be good business to have the same application under the rules. If you cannot agree to that we will, of course, have to handle each claim as it comes up which will mean an endless amount of work.

Under the circumstances I urge that you give this matter further consideration. What I have said with regard to the understanding reached when the Agreement was negotiated is the truth, and you will note that in the SD&AE Agreement we even put in the same examples as contained in the Southern Pacific Engineers' Agreement. That was at the request of Mr. Annable because he wished to have the Agreement complete and we concurred.

Yours very truly,

/s/ P. O. PETERSON

POP:JM

cc—Mr. L. D. Salisbury
Mr. C. C. Cummins

[fol. 203]

EXHIBIT G TO AFFIDAVIT OF J. P. COLYAR

[Stamp—Received—Nov 20 1944—P. O. Peterson]

**SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY**

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

**H. R. GERNREICH,
VICE PRESIDENT AND
GENERAL MANAGER**

DTB SD&AE 013-223 (Genl)

November 18, 1944

**Mr. P. O. Peterson
General Chairman—B.L.E.
840 Pacific Building
San Francisco, 3, Calif.**

Dear Sir:

Please refer to your letter of November 10, file E-10386-68, which has reference to your request that certain changes and additions be made in SD&AE Engineers' Agreement.

I will give you my decision in this case as promptly as possible.

Yours truly,

/s/ H. R. GERNREICH

[fol. 204]

EXHIBIT H TO AFFIDAVIT OF J. P. COLYAR

SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

H. R. GERNREICH,
VICE PRESIDENT AND
GENERAL MANAGER

DTB SD&AE E&F 2-7

December 19, 1944

Mr. P. O. Peterson
General Chairman—B.L.E.
840 Pacific Building
San Francisco, 3, Calif.

Dear Sir:

Referring to your letter of June 3, file E-10386-68, and subsequent correspondence ending with my letter of November 18, file DTB SD&AE 013-223 (Genl), which have reference to your request that certain changes and additions be made in SD&AE Engineers' Agreement.

You request that the following be added to Article 7, Section 3(b), Engineers' Agreement:

"Engineers deadheaded to an outside point to inaugurate service on an extra or unassigned work train, will be paid deadhead mileage under the provisions of Article 24, and will commence work train day at the time of arrival at such outside point in deadhead service."

You request that the following be added to Article 9 as Section 1(b), (c) and (d), Engineers' Agreement:

"(b) Engineers assigned to regular runs, who through no fault of their own are not used thereon

account runs not operated in whole or in part, will be paid 100 miles at rate applying on locomotive on which last used for each day runs are scheduled or bulletined to operate.

"(c) Engineers assigned to regular runs, who through no fault of their own are not used thereon and their runs are worked in whole or in part, will be allowed the full mileage of their assignments.

"(d) Engineers assigned to regular runs or pool freight service, called at the instance of the company [fol. 205] for service not included in their assignment, thus causing them to miss their regular run or turn, will be separately paid for each date on which earnings in other service does not equal earnings of assignment, not less than earnings of their assignment."

You request that the following notes be added to Article 15, Engineers' Agreement:

"NOTE (1): Engineers brought on duty in advance of the time specified in bulletin of assignment will be allowed a minimum of 100 miles for each time used, in addition to earnings of assignment. In each case rates and rules covering service performed will govern."

"NOTE (2): Engineers brought on duty subsequent to time specified in bulletin of assignment will be paid from time specified in bulletin of assignment."

Your request for these changes and additions was listed by you in your letter of September 18 asking for a conference to discuss this and other cases; this case being listed therein as follows:

"4. E-10386-68. DTB SD&AE/013-223 (Genl)."

We conferred on this case in my office at Los Angeles on September 23, at which time we reviewed my letter to you dated September 21 which was in reply to your letter of June 3. In my letter of September 21 I advised you that

I was agreeable to making some of the changes or additions requested and that I was not agreeable to making the other changes or additions requested.

You then stated that at the time the current SD&AE Engineers' Agreement was entered into Mr. Annabel stated to you that if the proposed agreement were to be worded the same as the then current Pacific Lines Engineers' Agreement, he desired to have the interpretations made upon the then current Pacific Lines Engineers' Agreement applied to the proposed SD&AE Engineers' Agreement, and that he wrote you to that effect, which letter you stated was in your files. I advised you I would endeavor to secure a copy of that letter and that if I could not locate it I would request you to furnish a copy thereof. I could not locate copy of that letter, and you advised me on November 10 that you could not locate it in your files.

[fol. 206] In deference to your statement that such an understanding was had between you and Mr. Annabel and that he so advised you in writing, although neither of us is able to locate that letter, I am agreeable, effective upon receipt of your concurrence, to making the above changes and additions as requested. I am also agreeable, effective upon receipt of your concurrence, to applying interpretations made on articles in Pacific Lines Engineers' Agreement that are similarly worded in SD&AE Engineers' Agreements to SD&AE Engineers' Agreement.

Upon receipt of your concurrence, necessary instructions will be issued.

Yours truly,

/s/ H. R. GERNREICH

cc—Cummins—7
Salisbury—3

[fol. 207]

EXHIBIT I TO AFFIDAVIT OF J. P. COLYAR

December 28, 1944

E-10386-68

DTB SD&AE E&F 2-7

Mr. H. R. Gernreich
Vice President and General Manager
San Diego & Arizona Eastern Ry. Co.
277 Pacific Electric Building
Los Angeles 14, California

Dear Sir:

This will acknowledge receipt of your letter December 19, 1944, in reply to my letters June 3 and November 10, regarding additions to Article 7, Section 3(b); Article 9, Section 1; and Article 12, SD&AE Engineers' Agreement.

I note you have granted the proposed additions, for which we thank you.

If consistent, I suggest that 12:01 AM, January 1, 1945, be made the effective date.

Yours very truly,

/s/ P. O. PETERSON

POP:JM

cc—Mr. L. D. Salisbury—2
Mr. C. C. Cummins

[fol. 208]

EXHIBIT J TO AFFIDAVIT OF J. P. COLYAR

SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

H. R. GERNREICH,
VICE PRESIDENT AND
GENERAL MANAGER

DTB SD&AE E&F 2-7

[Stamp—Received Jan 8 1945—P. O. Peterson]

January 4, 1945

Mr. P. O. Peterson
General Chairman—B.L.E.
840 Pacific Building
San Francisco, 3, Calif.

Dear Sir:

Please refer to your letter of December 28, file E-10386-68, which has reference to request that certain changes and additions be made in San Diego & Arizona Eastern Engineers' Agreement.

The changes and additions outlined in my letter of December 19 will be placed in effect as of 12:01 AM, January 1, 1945.

Yours truly,

/s/ H. R. GERNREICH

[fol. 209]

EXHIBIT K TO AFFIDAVIT OF J. P. COLYAR

October 2, 1947

E&F 47-49

83

SUBJECT: Official Ballot Case No. 32-21. E-10928-12-1(c);
011-122-2—Claim of Engineer C. O. Calloway,
San Joaquin Division for earnings of his assignment,
February 24 to March 18, inclusive, 1945.

Mr. H. C. Hobart, Asst. Grand Chief Engineer
Mr. J. P. Colyar, General Chairman
Brotherhood of Locomotive Engineers
840 Pacific Building
San Francisco 3, California

Gentlemen:

The above subject was discussed in conference September 26, 1947. The facts in connection therewith are contained in Mr. Hughes' letters to Mr. Peterson of September 13 and November 5, 1945. Briefly, Mr. Calloway had been under the care of a Hospital Department physician for a year because of a heart involvement and under instructions to report for further examination. At such examination, staff physician at Los Angeles found his condition to be such as to warrant the more extensive examinations and treatments obtainable by the facilities and services available in the General Hospital.

Engineer Calloway reported at the General Hospital February 28, 1945, was released March 17, 1945 and performed service on his regular assignment March 20, 1945.

Our discussion developed that information received from the Hospital Department showed conclusively that Mr. Calloway, while in the Hospital was treated by being given bed-rest and medication and was finally released after his condition showed improvement. In view of these facts, you stated the claim of Engineer Calloway is withdrawn.

We further advised you that with the understanding that it is the Company's responsibility to prescribe physical standards required of employes to qualify them for service and to remain in service, that we were agreeable in any case where an engineer was removed from his position on account of his physical condition and he desires the question [fol. 210] of his physical ability to conform to prescribed physical standards to be determined, the management was agreeable to setting up a special panel of doctors consisting of one doctor selected by the Company, one doctor selected by the employe or his representative, the two doctors thus selected to confer and appoint a third doctor specializing in the disease, condition or physical ailment from which the employe is alleged to be suffering. The management and the engineer to each defray the expenses of their respective appointee. The management and the engineer will each pay one-half the fee and traveling expenses of the third appointee. This panel of doctors upon completing their examination will make a full report in duplicate, one copy each to be sent the General Manager and the engineer. At the time of making the report a bill for the fee and traveling expenses, if there be any, of the third appointee shall be made in duplicate, one copy to be sent to the General Manager and one copy to the engineer.

Yours very truly,

(Signed) H. R. HUGHES
Assistant General Manager

(Signed) C. M. BUCKLEY
Assistant Manager of Personnel

Accepted:

(Signed) H. C. HOBART
Assistant Grand Chief Engineer, BLE

(Signed) J. P. COLYAR
General Chairman, BLE

cc—Mr. T. E. Bickers
Mr. C. W. Moffitt (3)

bc—Mr. J. W. Corbett
 Mr. R. E. Hallawell
 Mr. H. R. Hughes
 Mr. B. W. Mitchell (3)—Your file is attached.

C. M. Buckley

GHK MLJ BSS EDM JJJ LPH HRG GAB VMP
 HRH:epa

[fol. 211]

EXHIBIT L TO AFFIDAVIT OF J. P. COLYAR

(Letterhead of Southern Pacific Company,
 San Francisco 5, California)

November 13, 1947

E&F 47-49

Subject: Official Ballot Case No. 32-21. E-10938-12-1(c),
 011-122-2—Claim of Engineer C. O. Calloway,
 San Joaquin Division for earnings of his assign-
 ment, February 24 to March 18, inclusive, 1945.

Mr. G. W. Burbank, Asst. Grand Chief Engineer
 Brotherhood of Locomotive Engineers
 840 Pacific Building
 San Francisco 3, California

Dear Sir:

The above subject was discussed in conference September 26 and November 12, 1947. The facts in connection therewith are contained in Mr. Hughes' letters to Mr. Peterson of September 13 and November 5, 1945. Briefly, Mr. Calloway had been under the care of a Hospital Department physician for a year because of a heart involvement and under instructions to report for further examination. At such examination, staff physician at Los Angeles found his condition to be such as to warrant the more extensive ex-

aminations and treatments obtainable by the facilities and services available at the General Hospital.

Engineer Calloway reported at the General Hospital February 28, 1945, was released March 17, 1945 and performed service on his regular assignment March 20, 1945.

Our discussion developed that information received from the Hospital Department showed conclusively that Mr. Calloway, while in the Hospital was treated by being given bed-rest and medication and was finally released after his condition showed improvement. In view of these facts, you stated the claim is withdrawn.

In our discussion of this matter we outlined the company's policy in the disposition of claims for time lost by engineers undergoing physical examinations as follows:

Physical examinations of engineers generally fall into three categories:

- 1) *The regularly scheduled periodic re-examinations to determine if they are qualified for service.*

For the convenience of engineers and other employees in taking these re-examinations without having to lay off, [fol. 212] medical examination car is operated over the system, and examining physicians are at practically all terminals and at most layover points.

Engineers who have opportunity, but fail to attend medical examination car or to report to examining physician for the regular scheduled periodical re-examination and who thereafter are held for such re-examination will not be paid for time lost.

When an engineer is held off his assignment by an officer of the company to take physical re-examination and he can establish that because his on-duty hours made it impossible for him to attend the medical examination car or secure the re-examination by an examining physician, he will be paid for time lost provided the examination does not reveal any condition that would have prevented him from continuing at work.

- 2) *Re-checks or treatments ordered by the chief surgeon; or his representatives, because of a physical condition or ailment that, if not regularly checked or treated, may result in the disqualification of the engineer for service.*

Re-checks coming within this category are in the sole interest of preserving and improving the health of the individual engineer in order that his impaired condition may not progress to a point resulting in his becoming disqualified for service. In these circumstances payment is not allowed for time lost in taking re-checks or treatments but the company will cooperate with the individual engineer to arrange for the taking of said re-checks or treatments without loss of time, if it is practicable and reasonable to do so.

- 3) *Cases where the officer in charge is of the opinion that the physical condition of an engineer is such as to justify a special examination, and an engineer is withheld from service and is required to report for such examination at a specified time.*

Engineers undergoing such examinations, and found to be in satisfactory physical condition to continue in service without interruption are compensated for any time lost. No compensation is allowed if, as the result of this examination, the engineer is required to refrain from working or to undergo treatment before returning to service.

We also stated to you that it will be the company's purpose to avoid loss of time to engineers for re-examinations and re-checks so far as in the judgment of the management that may be practicable without detriment to the service.

We are sure that you appreciate that the physical examinations are of material benefit to the employee as they [fol. 213] permit in many cases arresting of physical ailments which if allowed to continue without treatment may result in total and permanent disability.

We further advised you, with the understanding that it is the company's responsibility to prescribe physical standards

required of employees to qualify them for service and to remain in service, that we were agreeable in any case where an engineer was removed from his position on account of his physical condition and he desires the question of his physical ability to conform to prescribed physical standards to be determined, the management was agreeable to setting up a special panel of doctors consisting of one doctor selected by the company, one doctor selected by the employee or his representative, the two doctors thus selected to confer and appoint a third doctor specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering. The management and the engineer will each defray the expenses of their respective appointee, and will each pay one-half of the fee and traveling expenses of the third appointee. This panel of doctors upon completing their examination will make a full report in duplicate, one copy each to be sent to the general manager and the engineer. At the time of making the report a bill for the fee and traveling expenses, if there be any, of the third appointee shall be made in duplicate, one copy to be sent to the general manager and one copy to the engineer.

Yours very truly,

/s/ H. R. HUGHES
Assistant General Manager

/s/ C. M. BUCKLEY
Assistant Manager of Personnel

Accepted:

/s/ G. W. BURBANK
Assistant Grand Chief Engineer, BLE

cc—Mr. T. E. Bickers

[fol. 214]

EXHIBIT M TO AFFIDAVIT OF J. P. COLYAR

(Letterhead of Brotherhood of Locomotive Engineers,
General Committee of Adjustment,
San Francisco 3, Calif.)

August 28, 1959

Org. File E-20037-32-3(b) SP
24-2(b) EP&SW
35-1 SD&AE

Mr. K. K. Schomp (6)
Manager of Personnel
Southern Pacific Company
San Francisco 5, California

Dear Sir:

This will serve as thirty days notice, as required by Section 6 of the Railway Labor Act, as amended and Article 36 of the agreement covering engineers on the Southern Pacific (Pacific Lines), Article 30 of the agreement covering engineers on the Former EP&SW, and Article 68 of the agreement covering engineers on the San Diego and Arizona Eastern, of the Committee's desire and intent to adopt the following as the second paragraph of Section 3(a), Article 32, SP engineers' agreement; the second paragraph of Section 2(b), Article 24 of the former EP&SW engineers' agreement, and as the second paragraph of Section 1, Article 35 of the SD&AE engineers' agreement:

"When an engineer has been removed from his position or has been restricted from performing service to which he is entitled by seniority on account of his physical condition, and desires the question of his physical *fitness*

Handwritten

~~condition~~ to be decided before he is permanently removed or restricted, he shall be privileged to have his case handled as follows:

"A special panel of doctors consisting of one doctor selected by the Company, one doctor to be selected by the employe or his representative, the two doctors to

fitness confer and if they do not agree on the physical condition of the engineer, they shall select a third doctor specializing in the disease, condition or physical ailment from which the engineer is alleged to be suffering.

"Such panel of doctors shall fix a time and place convenient to the engineer, for the engineer to meet with them for examination. The decision of the majority of said panel of doctors of the engineers physical fitness to remain in service or have restrictions modified [fol. 215] shall be controlling on both the Company and the engineer. This does not however, preclude a re-examination at any subsequent time should the physical condition of the engineer improve.

"The doctors selected by the Company and the engineer or his representative shall be a specialist in the disease or ailment from which the engineer is alleged to be suffering.

"The Company and the engineer will be separately responsible for any expense incurred by the doctor of their choice. The Company and the engineer shall each be responsible for one-half of the fee and expense of the third member of the panel."

Please advise the time and place for initial conference.

Yours truly,

/s/ J. P. COLYAR

[Handwritten notation—Cy to L C & Sec.—SP-EP&SW & SD&AE—and—Mr. A. S. Traylor]

[fol. 216]

EXHIBIT N TO AFFIDAVIT OF J. P. COLYAR

[Stamps—J.P.C.—Nov 6 1959—Received—Nov 6 1959—
B. of L.E.]

(Letterhead of Southern Pacific Company,
San Francisco 5, Calif.)

November 4, 1959

Org. File E-20037-32-3(b) SP
Co. File E&F 1-674
ER-32-3a-1-110

Mr. J. P. Colyar, General Chairman (4)
Brotherhood of Locomotive Engineers
Pacific Building
San Francisco 3, California

Dear Sir:

Reference is made to your letter of August 28, 1959, serving thirty days' notice, as required by Section 6 of the Railway Labor Act, as amended, and Article 36 of the agreement covering engineers, of the Committee's desire and intent to adopt as the second paragraph of Section 3(a), Article 32, of said agreement covering engineers, a provision to govern the handling to be accorded an engineer who has been removed from his position or who has been restricted from performing service to which entitled owing to his physical fitness, as set forth in your letter of August 28, which matter was discussed with you in conference on September 24, 1959.

In light of the understanding reached in the premises, we are, pursuant to your verbal request, November 3, 1959, attaching thirty-three (33) counterparts of agreement signed November 3, amending Section 3(a), Article 32, of

the agreement covering engineers, which agreement becomes effective December 1, 1959.

Please acknowledge receipt.

Yours truly,

/s/ L. M. Fox, JR.

Encl.

cc: M. A. B. McNabney (5):

Attached for your information and file are five copies of the above-mentioned agreement.

/s/ L. M. Fox, JR.

Encl.

[Handwritten notation—1 Cy each LC & Sec. S.P. Div.]

[fol. 217]

EXHIBIT O TO AFFIDAVIT OF J. P. COLYAR

E&F 1-674

AGREEMENT

between

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)
(Excluding Former El Paso and Southwestern System)

and its employees represented by the

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

• • • • •

It is hereby understood and agreed that Section 3(a), Article 32, of the agreement between the above parties, covering rates of pay, rules, and working conditions, signed at San Francisco, California, July 14, 1958, and which became effective August 1, 1958, is amended by insertion of the following as the second, third, fourth, fifth, and sixth paragraphs thereof:

When an engineer has been removed from his position or has been restricted from performing service to which he is entitled by seniority on account of his physical fitness and desires the question of his physical ability to conform to prescribed standards to be determined before he is permanently removed or restricted, he shall be privileged to have his case handled as follows:

A special panel of doctors consisting of one doctor selected by the Company, one doctor to be selected by the employe or his representative, the two doctors to confer and if they do not agree on the physical condition of the engineer, they shall select a third doctor specializing in the disease, condition or physical ailment from which the engineer is alleged to be suffering.

Such panel of doctors shall fix a time and place for the engineer to meet with them for examination. The decision of the majority of said panel of doctors of the engineer's physical fitness to remain in service or have restrictions modified shall be controlling on both the Company and the engineer. This does not, however, preclude a reexamination at any subsequent time should the physical condition of the engineer change.

The doctors selected by the Company and the engineer or his representative shall be specialists in the disease or ailment from which the engineer is alleged to be suffering.

[fol. 218] The Company and the engineer will be separately responsible for any expense incurred by the doctor of their choice. The Company and the engineer shall each be responsible for one-half of the fee and expense of the third member of the panel.

This agreement is effective December 1, 1959, and cancels all settlements, rulings, understandings, and practices in conflict therewith.

Signed at San Francisco, California, this 3rd day of November, 1959.

FOR THE COMPANY:

/s/ K. K. SCHOMP
Manager of Personnel

FOR THE EMPLOYEES:

/s/ J. P. COLYAR
General Chairman

Brotherhood of Locomotive Engineers

[fol. 219] Proof of Service by Mail (omitted in printing).

[fol. 220]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459 SD W

[Title omitted]

AFFIDAVIT OF F. J. GUNTHER—Filed June 5, 1962

State of California,
County of San Diego, ss.:

F. J. Gunther, being duly sworn, deposes and says:

I am petitioner in the above entitled cause and make this affidavit in support of my motion to be relieved from the operation of the judgment of this Court heretofore made and entered herein on October 27, 1961.

If called as a witness I would be competent to testify as follows:

For many years prior to my removal from active service by defendant on December 30, 1954, I was General Chair-

[File endorsement omitted]

man for the Brotherhood of Locomotive Firemen and Enginemen on the San Diego & Arizona Eastern Railway. At no time was I a member of the Brotherhood of Locomotive Engineers. My knowledge of the agreement between the San Diego & Arizona Eastern Railway and the Brotherhood [fol. 221] of Locomotive Engineers (hereinafter referred to as the SD&EA-BofLE agreement) was limited to those provisions thereof which were incorporated into the printed booklet which was submitted to this Court as Exhibit "A" to the affidavit of K. K. Schomp filed in the above matter on November 28, 1960, (the green-colored booklet containing rules effective March 1, 1935 with revised rates of pay effective October 1, 1937), and the printed booklet which was submitted to this Court as an exhibit to the affidavit of W. D. Lamprecht filed on or about February 13, 1958 in Action No. 2080-SD-W (the orange-colored booklet effective January 1, 1956, together with what additional information I obtained from time to time of changes or additions thereto agreed upon by the parties thereto. As a member of a rival labor organization, I was not provided by the Brotherhood of Locomotive Engineers with copies of all letters or other written memoranda evidencing changes or additions to said printed booklets, nor did I have access to the files of the Brotherhood of Locomotive Engineers or of the San Diego & Arizona Eastern Railway which contained such materials.

I have read the affidavit of J. P. Colyar submitted to the Court in support of the motion above referred to and the exhibits thereto.

At no time prior to reading said affidavit and exhibits was I aware of the October, 1947 agreement between the Southern Pacific Company and the Brotherhood of Locomotive Engineers (hereinafter referred to as the SP-BofLE agreement) to utilize a three-physician panel to determine disputes as to physical fitness of engineer employees as shown in exhibits K and L to said affidavit. For this reason I was unable to, and did not, advise my attorneys that,

as of October, 1947 or any other time prior to December 30, 1954, such a provision was a term of the SD&AE-BofLE agreement pursuant to the 1944 agreement between the [fol. 222] parties to that agreement to apply interpretations made on provisions of the SP-BofLE agreement to similarly worded provisions of the SD&AE-BofLE agreement as shown in exhibits A through J to said affidavit of J. P. Colyar.

At all times prior to reading said affidavit of J. P. Colyar it was my understanding that the SD&AE-BofLE agreement contained no specific provision for determining disputes as to physical fitness of locomotive engineers to continue in service by resort to a three-physician panel until January 1, 1956 when a provision was included as the last two paragraphs of Article 35 of the orange-colored booklet, "Agreement by and between the San Diego & Arizona Eastern Railway Company and its Locomotive Engineers represented by the Brotherhood of Locomotive Engineers effective January 1, 1956", which was attached to the affidavit of W. D. Lamprecht filed in Action No. 2080-SD-W on or about February 13, 1958.

F. J. Gunther

Subscribed and sworn to before me this 5 day of June, 1962.
Margit Nellaway, Notary Public, In and for the County of San Diego, State of California. My Commission Expires Oct. 1, 1963.

[fol. 223] Proof of Service by Mail (omitted in printing).

[fol. 224]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459 SD W

[Title omitted]

AFFIDAVIT OF CHARLES W. DECKER—Filed June 5, 1962

State of California,
City and County of San Francisco, ss.:

Charles W. Decker, being duly sworn, deposes and says:

I am one of the attorneys for petitioner in the above entitled matter and, in said capacity, have been the attorney who has prepared all of the pleadings and other documents filed with this Court, both in Civil Action No. 2080-SD-W and in Civil Action No. 2459-SD-W, on behalf of petitioner. I have also been the attorney to appear for petitioner in all but one of the court hearings held in both such actions.

The provisions of the agreement between the Southern Pacific Company and the Brotherhood of Locomotive Engineers, hereinafter referred to as the SP-BofLE agreement, and the provisions of the agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers, hereinafter referred to as the SD&AE-BofLE agreement, which are set forth in the affidavit of J. P. Colyar and the exhibits thereto and which provide for a three-physician panel to resolve disputes concerning the physical fitness of regularly assigned engineers were not brought to my attention until after Notice of Appeal from the Judgment of October 27, 1961 had been filed and said appeal docketed with the Circuit Court of Appeals for the Ninth Circuit. I learned of said provisions first on or about February 28, 1962 when I attended a conference at the office of J. P. Colyar, Chair-

[File endorsement omitted]

man of the General Committee of Adjustment, Brotherhood of Locomotive Engineers at his office located at 821 Market Street, San Francisco, California. At said conference I was advised by Mr. Colyar of said provisions.

Until said time it was my understanding that the green-covered booklet dated March 1, 1935, and containing the terms of the SD&AE-BofLE agreement as of November 30, 1938, contained all of the terms of the SD&AE-BofLE agreement as of December 30, 1954, the date of petitioner's separation from active service by defendant.

Said understanding was based upon the following facts. In my initial conferences with petitioner he advised me that for many years prior to his severance from active service by defendant he was General Chairman of the Brotherhood of Locomotive Firemen and Enginemen for the San Diego & Arizona Eastern Railway Company; that said labor organization had, as members, both firemen and locomotive engineer employees of said railway; that during his incumbency as General Chairman for said labor organization he had regularly processed claims against the San Diego & Arizona Eastern Railway on behalf of engineer employees and, in so doing, was asserting contractual rights of said employees based upon the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers. At one of said early conferences Mr. [fol. 226] Gunther provided me with a copy of the green-covered booklet dated March 1, 1935 containing the terms of said agreement as of November 30, 1938 and advised me that said booklet was a copy of the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers and that it contained all of the terms of employment by said railway company of its locomotive engineers in effect at the time he was removed from active service by defendant on December 30, 1954. At no time did he advise me of the possibility that said booklet did not contain all of the terms of the SD&AE-BofLE agreement in effect at said time.

This advice as to the terms of the SD&AE-BofLE agreement as of December 30, 1954 was confirmed to me by the representations made to this Court by defendant's representatives and attorneys in the course of court action No. 2080-SD-W and No. 2459-SD-W.

In paragraph IV of defendant's answer filed on or about May 27, 1957 in Action No. 2080-SD-W which, at said time, had not yet been transferred from the United States District Court for the Northern District of California, Southern Division, to this Court, defendant admitted that petitioner's employment with defendant was subject to the terms of a collective bargaining agreement by and between the San Diego & Arizona Eastern Railway Company and its locomotive engineers, represented by the Brotherhood of Locomotive Engineers, and admitted that there was no provision in said agreement relating to the age at which employees covered thereby should retire from active service.

In the pre-trial memorandum submitted by defendant's attorneys to this Court in Civil Action 2080 SD W on or about January 10, 1958, said attorneys stated, with reference to the applicable collective bargaining agreement:

"There is no provision in the applicable collective bargaining contract restricting in any way the right and duty of the company to determine the physical fitness of its employees to perform their duties."

[fol. 227] In Supplementary Pre-Trial Memoranda filed by the parties on or about January 30, 1958 in said action 2080 SD W, petitioner indicated under the caption "portions of the Agreement Relied Upon by Petitioner" that certain portions of Articles 35, 38 and 47 as set forth in said green-colored booklet dated March 1, 1935, were the portions of the agreement relied upon by petitioner and defendant, in its memoranda, noted, at page 4, lines 6 through 8, that none of these articles in any way limited the right of the railroad to remove engineers from active service when it finds they are no longer qualified for such

service. On page 8 of that memorandum, counsel for defendant stated:

"The contract between the defendant and the Brotherhood of Locomotive Engineers speaks for itself and clearly contains nothing depriving the company of this right and duty."

On or about February 13, 1958 defendant filed notice of motion and motion for summary judgment in Action No. 2080 SD W. In support thereof, the affidavit of W. D. Lamprecht was filed. The affidavit, in part, read as follows:

"I am Vice-President of San Diego & Arizona Eastern Railway Company and am thoroughly familiar with its operations.

I am familiar with the case of Mr. F. J. Gunther which is pending before this Court under the above-entitled number. I am also familiar with the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers.

In December, 1954, when Mr. Gunther last performed active service as a locomotive engineer, the applicable printed agreement was the green colored booklet dated March 1, 1935, which is on file with the Court as Defendant's Exhibit 1, together with amendments noted therein. Since the date of the aforementioned agreement there have been numerous amendments too voluminous to set forth. In lieu of setting out all of these amendments separately, I am attaching an orange-colored booklet by the same title, i.e., Agreement between San Diego & Arizona Eastern Railway Company and its Locomotive Engineers represented by the Brotherhood of Locomotive Engineers, effective January 1, 1956, which contains all of the aforementioned amendments. In so far as the latter booklet has any [fol. 228] applicability to this case, it represents the

agreement as it stood as of December 30, 1954, and any and all other dates material to this matter."

The last two paragraphs of Article 35 of the "orange-colored booklet" referred to by Mr. Lamprecht read as follows:

"In case of a question of said engineer's mental or physical fitness to return to duty, and said engineer desires to submit to an examination, he shall be accorded the right to submit to a doctor appointed by the Company. If the Company's doctor finds said engineer unfit mentally or physically to return to duty he shall have the right of appeal to a special panel of doctors consisting of one doctor selected by the Company, one doctor selected by the employee or his representative, the two doctors thus selected to confer and appoint a third doctor specializing in the disease, condition or physical ailment which is alleged to prevent his return to duty. The findings of the majority of the doctors on said special panel of doctors will govern the right of the engineer to return to duty.

"The management and the engineer will each defray the expenses of their respective appointee, and will each pay one-half of the fee and traveling expenses of the third appointee."

Affiant noted the statement of Mr. Lamprecht, contained in said affidavit, that "insofar as said booklet has any applicability to this case, it represents the agreement as it stood as of December 30, 1954, and any and all other dates material to this matter." However, in view of the earlier assertions of defendants representatives and attorneys in Action No. 2080-SD-W to the effect that, as of December 30, 1954 the applicable agreement contained no provision for a three doctor panel to determine the physical fitness of locomotive engineers to remain in active service, did not construe Mr. Lamprecht's statement to mean that the above-quoted paragraphs from Article 35 of the January 1, 1956 agreement, or a provision comparable thereto, were a part of the SD&AE-BofLE agreement as of December

30, 1954. And, as shown below, the representations of defendant's attorneys and representatives in this action confirmed to affiant that the three-physician panel provision was not a part of the SD&AE-BofLE agreement at any time prior to January 1, 1956.

[fol. 229] In his petition initiating Action No. 2459-SD-W, petitioner again did not set forth *in haec verbae* the provisions of the agreement upon which he relied but alleged simply that the terms of his employment were governed by the terms of the agreement by and between the San Diego & Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers; that said agreement did not require employees covered by same to retire from active service at any stated age limit; and that by the terms of said agreement, at all times mentioned in the petition the petitioner had seniority rights which entitled him to continue in the active service of defendant as a locomotive engineer.

Without answering, on or about November 25, 1960, defendant gave notice of motion for summary judgment and moved for summary judgment. In support its motion, defendant submitted to this Court the affidavit of K. K. Schomp. Said affidavit, in part, read as follows:

"I am Manager of Personnel of the San Diego & Arizona Eastern Railway Company and am thoroughly familiar with the collective bargaining agreement relating to the wages, rules and working conditions of its personnel. In my present position I represent the Company in negotiations with representatives of the employees, including the employees engaged in engine, train and yard service represented by the various operating brotherhoods.

"I make this affidavit for use in connection with the motion for summary judgment filed by defendant in this action. I am familiar with the case of Mr. F. J. Gunther, which is pending before this Court under the above-entitled number. I am also familiar with the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brother-

hood of Locomotive Engineers. In December, 1954, when Mr. Gunther last performed active service as a locomotive engineer, the applicable printed agreement was a green colored booklet dated March 1, 1935, which was on file with the Court as Defendant's Exhibit 1 in Mr. Gunther's prior case (Civil No. 2080-SD-W). A copy of this agreement is attached as Exhibit A to [fol. 230] this affidavit. On December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of Company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform service."

In its Memorandum of Points and Authorities submitted in support of said motion, commencing at page 14 thereof, counsel for defendant, by representing to the Court that the award of the National Railroad Adjustment Board, First Division, which petitioner sought enforcement of in said action, constituted an attempt on the part of the Board to "write a new contractual provision which would create a three-doctor panel and which would add terms to a contract under the guise of interpretation" in effect advised the Court that the SD&AE-BofLE Agreement as of December 30, 1954, contained no provision for resolving disputes as to an engineer's physical fitness by resort to a three-doctor panel.

Thereafter, on or about December 1, 1960, defendant submitted the Supplemental Affidavit of K. K. Schomp in support of said motion. Said affidavit read, in part, as follows:

"K. K. SCHOMP, being first duly sworn, deposes and says:

I am Manager of Personnel of San Diego & Arizona Eastern Railway Company and I have heretofore made

an affidavit in support of defendant's motion for summary judgment in this case.

As I stated in the affidavit dated November 23, 1960, the employment of Mr. F. J. Gunther at all times material to the pending action was subject to the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers, dated March 1, 1935, as amended. On December 30, 1954, the date on which Mr. Gunther was released from active service because of the doctor's report of his physical condition, the aforesaid collective bargaining agreement, including amendments thereto, contained no provision whatever relating to a three-doctor panel which could review the medical findings of the defendant's doctors with respect to the physical condition and ability of its locomotive engineers to operate its trains.

[fol. 231] Since December 30, 1954, there had been no such agreement or amendment until the agreement signed on November 3, 1959, to become effective December 1, 1959, a copy of which is attached as Exhibit A hereto, with the exception of amendment to Article 35, Section 3(c), of the applicable agreement, effective February 1, 1957, which had no application to the circumstances involved in the employment of Mr. Gunther, and which was predicated solely upon the prior institution of legal proceedings by an employee.

I enclose as Exhibit B hereto the demand of the Brotherhood of Locomotive Engineers which culminated in Exhibit A hereto. This demand is dated August 28, 1958, and seeks the inclusion of a three-doctor panel in the existing collective bargaining agreement to which I have heretofore referred."

Exhibits "A" and "B" to Mr. Schomp's Affidavit evidence an amendment to the SD&AE-BofLE Agreement effective December 1, 1959, and providing for resolution of disputes as to physical fitness by resort to a three-doctor panel. There was no indication in said affidavit of the earlier adop-

tion by the parties to the SP-BofLE Agreement of such a provision for that contract, as evidenced by Exhibits "K" and "L" to the Affidavit of J. P. Colyar filed and served herewith, and its incorporation into the SD&AE-BofLE Agreement by reason of the prior agreement of the parties thereto to adopt interpretations placed upon the SP-BofLE Agreement as evidenced by Exhibits "A" through "J" to the Affidavit of J. P. Colyar filed and served herewith.

This Court denied defendant's motion for summary judgment by Order of March 27, 1961. Said denial however was without prejudice to defendant's right to renew same on the ground that the award of the National Railroad Adjustment Board, First Division, sought to be enforced herein was in excess of the Board's jurisdiction in that it imposed upon defendant an obligation which was not to be found in the applicable agreement.

Defendant then answered the petition and, simultaneously therewith, filed a second motion for summary judgment. In its answer to petitioner's allegations of his con-[fol. 232] tractual right to remain in service, defendant, again, admitted that petitioner's employment was subject to the terms of a collective bargaining agreement by and between the San Diego & Arizona Eastern Railway Company and its engineers represented by the Brotherhood of Locomotive Engineers, and that said agreement contained no provision relating to the age at which employees covered thereby should retire from active service.

In support of said second motion for summary judgment, defendant submitted to this Court the Affidavit of K. K. Schomp, Manager of Personnel of the San Diego & Arizona Eastern Railway Company, which read in part as follows:

"I am familiar with the case of Mr. F. J. Gunther, which is pending before this Court under the above-entitled number. I am also familiar with the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers. In December, 1954, when Mr. Gunther last performed active service as a locomotive

engineer, the applicable printed agreement was a green colored booklet dated March 1, 1935, which was on file with the Court as Defendant's Exhibit 1 in Mr. Gunther's prior case (Civil No. 2080-SD-W). A copy of this agreement has heretofore been filed with the Court in this case and copies have been distributed to petitioner's counsel and it is referred to herein as Exhibit "A" to this affidavit. On December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of Company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform service."

...

"Prior to and since December 30, 1954, the collective bargaining agreement attached as Exhibit "A" has been the contract governing the employment of Mr. Gunther. Until December 1, 1959, this contract contained no provision creating a three-doctor panel to review the physical condition of a locomotive engineer who has been removed from his position or restricted from performing service for this reason on advice of the Company's physicians, nor for any other review of the decisions of the Company's physicians on the subject. This fact was recognized by a demand served upon the defendant company under date of August 28, 1959, by the Brotherhood of Locomotive Engineers through its General Chairman, Mr. J. P. Colyar. Mr. Colyar has at all material times represented the locomotive engineers employed by defendant for collective bargaining purposes. A copy of Mr. Colyar's demand is attached, together with the amending agreement of December 1, 1959, as Exhibit "C".

Again, although defendant discloses the existence of a contractual provision for a three-physician panel to be resorted to in the event of disputes as to physical fitness, effective December 1, 1959, there is failure to advise the

Court of the existence of such a provision as early as November 13, 1947, as demonstrated by the Affidavit of J. P. Colyar filed and served herewith. Consistent with the contents of Mr. Schomp's Affidavit of May 11, 1961, counsel for defendant, in their memorandum of points and authorities submitted to this Court in support of the second motion for summary judgment in Civil Action No. 2459-SD-W, advised the Court as follows:

"The entire collective bargaining agreement upon which the parties hereto rely is the booklet attached as Exhibit "A" to the affidavit of Mr. K. K. Schomp, which is filed in support of this motion. It contains no provision whatever creating a three-doctor panel to review the decision of the carrier's physicians with respect to the physical fitness of its locomotive engineers to operate engines and trains."

...

"Mr. Schomp's affidavit declares that there has been no pertinent amendment to the applicable contract (Exhibit "A") until December 1, 1959; that the latter amendment is attached to the affidavit as Exhibit "C"; and that by virtue of Exhibit "C" the applicable collective bargaining agreement for the first time provided for a three-doctor panel review of a decision of the company's physicians as to whether a locomotive engineer is physically disqualified from performing active service. It is clear that there would have been no occasion for such an amendment if there had been a provision for such a review in the agreement. It is significant to note that petitioner cannot challenge this statement in an affidavit."

The contents of the Affidavit of Petitioner, F. J. Gunther, in opposition to defendant's second motion for summary judgment dated May 26, 1961, are consistent with the contents of his affidavit filed and served simultaneously herewith, in that in the affidavit of May 26, 1961, he reiter-[fol. 234] ates his reliance upon Articles 35, 47 and 38 of the SD&AE-BofLE Agreement of March 1, 1935 and does

not refer to the subsequent amendment of said agreement by the addition of a provision for adjudicating disputes as to physical fitness by resort to a three-physician panel as evidenced by Exhibits "A" through "L" to Mr. Colyar's affidavit filed and served herewith.

Finally, affiant participated in the oral argument upon defendant's second motion for summary judgment which took place on May 29, 1961. At said time, the Court requested affiant to advise it of the language contained in the SD&AE-BofLE Agreement of March 1, 1935, which petitioner relied upon and affiant, referring to the green-covered booklet, pointed to Articles 35, 47, 38 as set forth therein. At said argument, counsel for defendant represented to the Court that said green-covered booklet contained all of the provisions of the applicable agreement pertinent to the issues raised by the petitioner and failed to advise the Court of the existence of the provision for resort to a three-physician panel to resolve disputes as to physical fitness by addition of such a provision to the 1935 agreement as indicated by the Affidavit of J. P. Colyar and the exhibits thereto filed and served herewith.

I relied upon the foregoing advice received from petitioner and representations of defendant's representatives and attorneys in my conduct, on behalf of petitioner, of Actions 2080-SD-W and 2459-SD-W and at no time prior to said conference with Mr. J. P. Colyar of the Brotherhood of Locomotive Engineers did I receive information indicating that the controlling contractual provisions were to be found elsewhere than in said green-covered booklet.

Dated: June 1, 1962.

Charles W. Decker.

Subscribed and sworn to before me this 1st day of June, 1962.

Alice L. O'Connor, Notary Public in and for the City
and County of San Francisco, State of California.
(Seal) My Commission Expires April 17, 1964.

[fol. 235] Proof of Service by Mail (omitted in printing).

[fol. 236]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil No. 2459-SD-W

[Title omitted]

AFFIDAVIT OF C. M. BUCKLEY—Filed July 9, 1962

State of California,
County of San Mateo, ss.

C. M. Buckley, being first duly sworn, deposes and says:

I am a citizen of the United States and of the State of California, residing in San Mateo County. On November 30, 1957, I retired from the service of Southern Pacific Company as Assistant to Vice President-System Operations.

I have read the affidavits of Messrs. Colyar, Gunther and Decker which were filed in the above-mentioned proceeding within the last month in support of the Motion for Relief from Operation of Judgment pursuant to Rule 60(b). I am thoroughly familiar with the collective bargaining agreements to which they refer and with the facts and circumstances involved in this matter. Throughout the period [fol. 237] covered by Exhibits "A" through "L" to Mr. Colyar's affidavit I was Assistant Manager of Personnel, Southern Pacific Company, directly charged with the negotiation and administration of the collective bargaining agreements relating to the employment of engineers and firemen employed by Southern Pacific Company. My signature appears in such capacity in both Exhibits "K" and "L" to the said affidavit.

My service with Southern Pacific Company commenced on July 22, 1903, as engine wiper. Thereafter, I was em-

[File endorsement omitted]

ployed as fireman in August of 1905, and was promoted to locomotive engineer on June 18, 1916. Thereafter, I served as Assistant Trainmaster at El Centro, California, in 1929 and 1930, then returned to engine service as a locomotive engineer until January 1, 1940, when I was appointed Assistant Manager of Personnel, with headquarters at San Francisco, California. On April 1, 1940, I was designated to represent the Company in negotiations with representatives of the employees in engine service. I continued in this capacity until my appointment to the position of Assistant to Vice President in Charge of Operations on August 16, 1954. In the latter capacity and until my retirement in 1957, I was assigned to handle matters involving collective bargaining agreements and negotiations on a national scale.

During this period of service I occupied the position of Local Chairman, Brotherhood of Locomotive Firemen and Enginemen, Los Angeles Division, Southern Pacific Company, in 1915. Thereafter, in February of 1922, I was elected Local Chairman, Brotherhood of Locomotive Engineers, and served in this position on the Los Angeles Division until 1928, and again from 1934 to 1939, at which time I was elected Vice General Chairman, General Committee, Brotherhood of Locomotive Engineers, Southern Pacific Company, in which position I served until my appointment as Assistant Manager of Personnel by the Company.

[fol. 238] In 1947, during disposition of matters involved in Brotherhood of Locomotive Engineers Official Strike Ballot dated January 6, 1947, I was a Southern Pacific Company representative in negotiating settlement of numerous claims and grievances listed by the Brotherhood of Locomotive Engineers in said Official Strike Ballot, among which claims was that of Engineer C. O. Calloway for compensation for time lost owing to his having been required by the Company to report to the General Hospital for physical examination. While there was no rule contained in the collective bargaining agreement applicable to engineers employed by the Southern Pacific Company to govern in the disposition of such claims, it had been the policy of the Company, under certain circumstances, to pay en-

gineers for time lost while undergoing physical examination and, under other circumstances involving physical examination, to decline payment of such claims. Under the factual situation involved in the claim of Engineer Callo-way, Company policy would not permit payment of the claim, and during conferences on September 26 and November 12, 1947 (see Exhibits "K" and "L" attached to Mr. Colyar's affidavit), in recognition of the application of Company policy said claim was withdrawn by Brotherhood of Locomotive Engineers representatives.

At those conferences I participated in discussions with Brotherhood of Locomotive Engineers representatives, including Mr. Colyar, concerning matters involving other aspects of the question of the Company's right to prescribe physical standards for its engineers. During said discussions the question of restriction of an engineer's seniority owing to his removal from his position account of his physical condition not meeting prescribed Company standards arose and was eventually disposed of by our agreement, during conference with Brotherhood of Locomotive Engineers representatives, that in such cases in the future a three-doctor panel would be provided in event an engineer [fol. 239] desired the question of his physical ability to conform to prescribed physical standards to be determined. Agreement on such new rule was confirmed by Company representatives and accepted by Brotherhood of Locomotive Engineers representatives on October 2, 1947 (see Mr. Colyar's Exhibit "K"), and November 13, 1947 (see Mr. Colyar's Exhibit "L").

At no time during negotiation of the new rule involving the three-doctor panel was any portion thereof considered by either the Company or Brotherhood of Locomotive Engineers negotiators to constitute an interpretation of Article 12 of the collective bargaining agreement applicable to Southern Pacific engineers or of any other rule then existing in said collective bargaining agreement or in any other agreement, but was in itself an entirely new rule negotiated solely to apply to engineers on the Southern Pacific Company (Pacific Lines).

To my knowledge the said new rule had not been negotiated to apply as a part of the collective bargaining agreement applicable to engineers on the San Diego and Arizona Eastern Railroad on or prior to August 15, 1954, the date of my last employment as Assistant Manager of Personnel with the Southern Pacific Company.

C. M. Buckley

(Signature illegible.) Notary Public in and for the County of San Mateo, State of California.

James W. Archer, Notary Public in and for the County of San Mateo, State of California.

[fol. 240]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION
Civil No. 2459-SD-W

[Title omitted]

AFFIDAVIT OF K. K. SCHOMP—Filed July 9, 1962

State of California,
City and County of San Francisco, ss.

K. K. Schomp, being first duly sworn, deposes and says:

I am Manager of Personnel of the San Diego & Arizona Eastern Railway Company (SD&AE) and I have heretofore made an Affidavit on November 25, 1960, and a Supplemental Affidavit on December 1, 1960, in support of defendant's motion for summary judgment in the case of Mr. F. J. Gunther.

I am also Manager of Personnel of the Southern Pacific Company (Pacific Lines) (S.P.) and am thoroughly familiar with the collective bargaining agreement relating to the

[File endorsement omitted]

wages, rules, and working conditions of engineers employed by the Southern Pacific Company (Pacific Lines).

[fol. 241] I have read the Affidavits of Mr. J. P. Colyar, Mr. C. W. Decker, and Mr. F. J. Gunther, filed and served June 4, 1962, with petitioner's Notice of Motion For Relief From Final Judgment in Civil Action No. 2459-SD-W, and, regardless of any arguments contained in said Affidavits, I again affirm that on December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of Company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform service.

Mr. Colyar attaches as his Exhibits "H" and "I" an agreement between SD&AE and the Brotherhood of Locomotive Engineers (BLE) that interpretations of existing S.P. agreement provisions would apply to similarly worded SD&AE agreement provisions thereafter. Exhibits "K" and "L" to Mr. Colyar's affidavit are documents creating a new agreement provision on S.P. which was never extended to SD&AE. An agreement providing for a three-doctor panel was thereafter negotiated on SD&AE between Mr. J. P. Colyar and Mr. L. M. Fox, Jr., who represents me in the handling of matters involving the collective bargaining agreement applicable to engineers on the SD&AE. A copy of this agreement is attached as a part hereof as Exhibit "A".

Furthermore, the three-doctor panel agreement which was created on S.P. by the letters attached as Exhibits "K" and "L" to Mr. Colyar's affidavit has never been interpreted on S.P. from 1947 to the present date.

K. K. Schomp

Subscribed and sworn to before me this 6th day of July, 1962.

Norman T. Stone (Notarial Seal), Notary Public in and for the City and County of San Francisco, State of California.

[fol. 242]

CLERK'S NOTE:

Exhibit A to Affidavit of K. K. Schomp, "Agreement between San Diego and Arizona Eastern Railway Company and its engineers represented by the Brotherhood of Locomotive Engineers signed on November 3, 1959" is omitted from the record here as it appears on pages 17-19 supra.

[fol. 244]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION
Civil No. 2459-SD-W

[Title omitted]

AFFIDAVIT OF C. A. BALL, JR.—Filed July 9, 1962

State of California,
City & County of San Francisco, ss.:

C. A. Ball, Jr., being first duly sworn, deposes and says:

I am First Assistant Manager of Personnel on the staff of the Manager of Personnel of the Southern Pacific Company, a position I have held since January 1, 1958. Prior to 1947 I was employed by the Company as a locomotive fireman, engineer and road foreman of engines for approximately ten years. On October 1, 1947, I was first appointed to said staff as Assistant Manager of Personnel and until August 16, 1954, assisted Mr. C. M. Buckley, the Assistant Manager of Personnel delegated at that time with responsibility for the administration of the collective bargaining agreement covering engineers employed by the [fol. 245] Southern Pacific Company (Pacific Lines). On August 16, 1954, upon the promotion of Mr. Buckley, I assumed the responsibility previously delegated to him and served in that capacity until January 1, 1958.

I am familiar with the case of Mr. F. J. Gunther and have read the affidavits of Messrs. Colyar, Decker, and

[File endorsement omitted]

Gunther which have been filed in support of the Motion for Relief from Operation of Judgment and am thoroughly familiar with the collective bargaining agreements referred to in said affidavits.

I have dealt with matters involving the application of agreements covering locomotive engineers of the Southern Pacific Company (Pacific Lines) during the entire existence of the letters of agreement dated October 2, 1947, Mr. Colyar's Exhibit "K", and November 13, 1947, Mr. Colyar's Exhibit "L", and at no time from the inception thereof to the present has any part of the agreement thereby evidenced been considered to constitute an interpretation of any provision, including Article 12, of the agreement covering Southern Pacific Company locomotive engineers. It has always been my understanding that the letter agreement of November 13, 1947, constituted a statement of Company policy to apply in the disposition of claims of its engineers arising when engineers lose time as a result of being required by the Company to take physical examinations to determine whether their physical condition meets prescribed standards, plus the last paragraph which is a new rule providing a three-doctor panel in cases arising where a Southern Pacific locomotive engineer who has been removed from service because his physical condition did not meet Company requirements; and where such an engineer desires the question of his physical ability to meet such requirements to be reviewed by a three-doctor panel. I have never been advised by Mr. Colyar or any representative of the Brotherhood of Locomotive Engineers of an understanding on their part contrary to my understanding in the premises.

The first and only provision for a three-doctor panel to [fol. 246] apply to an engineer on the SD&AE under the factual circumstances of the Gunther case was the new rule negotiated effective December 1, 1959, to become the second paragraph of Section 1 of Article 35 of the collective bargaining agreement applicable to locomotive engineers employed by the SD&AE.

C. A. Ball, Jr.

Subscribed and sworn to before me this 6th day of July, 1962.

Norman T. Stone (Notarial Seal), Notary Public in and for the City and County of San Francisco, State of California. My commission expires October 25, 1964.

[fol. 247]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION
Civil No. 2459-SD-W

[Title omitted]

AFFIDAVIT OF L. M. Fox, JR.—Filed July 9, 1962

State of California,
County of San Mateo, ss.:

L. M. Fox, Jr., being first duly sworn, deposes and says:

I am Assistant Manager of Personnel on the staff of Mr. K. K. Schomp, Manager of Personnel of the Southern Pacific Company (Pacific Lines), and since January 1, 1958, have been delegated by Mr. Schomp with responsibility for the administration of agreement provisions governing rates of pay, rules, and working conditions of engineers employed by that Company. Since 1954 I have been directly concerned in handling of matters involving this agreement. I commenced my employment with the company in 1941 as a locomotive fireman on the Shasta Division, was promoted to locomotive engineer with a seniority date in 1946 and thereafter received appointments as enginemen's instructor and assistant road foreman of engines on that Division. From and since August 16, 1954, I have been an Assistant Manager of Personnel.

Mr. Schomp, as manager of Personnel of the San Diego and Arizona Eastern Railway Company, has delegated me to represent him in the handling of matters arising from

[File endorsement omitted]

the administration of the collective bargaining agreement applicable to engineers employed by that Company.

I am familiar with the case of Mr. F. J. Gunther and have read the affidavits of Messrs. Gunther, Colyar, and Decker which were filed herein in support of the Motion for Relief from Operation of Judgment. I am thoroughly familiar with the collective bargaining agreement applicable to locomotive engineers employed by the San Diego and Arizona Eastern Railway (SD&AE) and with the collective bargaining agreement applicable to locomotive engineers employed by the Southern Pacific Company (Pacific Lines) (SP).

There existed, as a part of the collective bargaining agreement applicable to Mr. Gunther, no provision for such three-doctor panel to apply in like circumstances until the rule which was negotiated between Mr. Colyar and me became effective December 1, 1959, as the second paragraph of Section 1, Article 35, of the collective bargaining agreement covering locomotive engineers on the SD&AE (Exhibit A to the affidavit of Mr. Schomp filed herewith).

Said new rule originated from Mr. Colyar's demand served on this defendant company dated August 28, 1959, which was also served on the Southern Pacific Company. The initial conference in connection with the demand served upon both companies was held in my office, Room 258, 65 Market Street, San Francisco, California, on September 24, 1959. At the beginning of such conference I questioned Mr. Colyar as to his reason for serving a demand for a three-doctor panel rule on the Southern Pacific Company in view of the fact that such rule existed, applicable to Southern Pacific engineers, in the letter agreement [fol. 249] of November 13, 1947 (Mr. Colyar's Exhibit "L"). Mr. Colyar stated that it was the Organization's desire to broaden the rule to cover those engineers who are limited to the performance of certain work owing to their physical condition. Regarding the demand served on the SD&AE, Mr. Colyar stated that it was the Organization's desire to negotiate a rule to provide a three-doctor panel to apply to engineers employed by the SD&AE. He farther stated that it was desired that said rule be identi-

cal with the Southern Pacific Company rule in order to "standardize" the collective bargaining agreements administered by the Brotherhood of Locomotive Engineers General Committee of Adjustment, of which he is Chairman.

At no time during said negotiations did Mr. Colyar indicate in any manner that he considered the letter agreements dated October 2 and November 13, 1947, to be applicable to engineers of the SD&AE. All discussion between us regarding the demand for a provision for a three-doctor panel to be included in the collective bargaining agreement applicable to engineers of the SD&AE was on the basis that such was a new rule to be included in said agreement without the prior existence of any part thereof.

The letter agreements of October 2 and November 13, 1947, do not constitute an interpretation of Article 12 of the collective bargaining agreement covering engineers of the Southern Pacific Company and have not been applied to engineers of that Company as an interpretation of said Article 12.

L. M. Fox, Jr.

Subscribed and sworn to before me this 6th day of July, 1962.

Norman T. Stone, Notary Public in and for the County of San Mateo, State of California.

[fol. 250]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Civil No. 2459-SD-W

[Title omitted]

AFFIDAVIT OF W. A. GREGORY—Filed July 9, 1962

I am one of the attorneys for defendant in the above-entitled matter and have been directly involved in this

[File endorsement omitted]

proceeding since its inception. I have read the affidavits of Charles W. Decker, J. P. Colyar and F. J. Gunther which have been filed with the Court in connection with petitioner's Motion for Relief From Operation of Judgment Pursuant to Rule 60(b), F.R.C.P., which motion is allegedly based upon excusable negligence and newly discovered evidence.

There is no proper basis whatever for petitioner's motion. At no time prior to December 1, 1959, was there any provision in the collective bargaining agreement between the Brotherhood of Locomotive Engineers and the San Diego & Arizona Eastern Railway Company which had any application whatever to the circumstances involved in [fol. 251] the employment of Mr. Gunther. This fact appears in the various memoranda filed with this Court by the attorneys for defendant, as is more particularly set forth in Mr. Decker's affidavit, and further appears in the sworn affidavits of Mr. W. D. Lamprecht, Vice President of defendant, and Mr. K. K. Schomp, Manager of Personnel of defendant, as is more particularly referred to in Mr. Decker's affidavit. This fact is substantiated by the affidavit of Mr. J. P. Colyar, to which I have already referred, since the facts upon which he relies show conclusively that there was no three-doctor panel provision in the San Diego & Arizona Eastern Railway Company agreement with its locomotive engineers at any time material to Mr. Gunther's case. The facts alleged by Mr. Colyar do not support any conclusion that such a three-doctor panel existed on San Diego & Arizona Eastern Railway. Instead, Mr. Buckley's affidavit herein demonstrates that Messrs. Colyar, Gunther and Decker are attempting to do the very thing which this Court has already denied in the judgment from which relief is sought, viz., attempting to write an agreement provision into the San Diego & Arizona Eastern Railway Company agreement under the guise of interpretation. The National Railroad Adjustment Board cannot do this. Petitioner cannot do this either.

In view of the foregoing, Mr. Decker is in no position to characterize the representations made to this Court by

defendant's representatives and attorneys either as erroneous or as intentional misrepresentations.

Nor is Mr. Decker in a position to contend that he could not by due diligence have discovered any or all of the "evidence" to which he refers. Exhibits "A" through "L" were papers written by or to, or participated in by, the Brotherhood of Locomotive Engineers between 1944 and 1947. Mr. Decker points out in his affidavit (page 2, lines 19 through 31) that Mr. Gunther was General Chairman of the Brotherhood of Locomotive Firemen and Enginemen representing [fol. 252] employees of defendant, and regularly processed claims against defendant on behalf of locomotive engineer employees asserting their contractual rights based upon the locomotive engineers' agreement. In these circumstances, Mr. Gunther must have known that amendments to the agreement are made between the parties which are included in the next reprinting of the full agreement. This is apparent to anyone, for example, from an examination of Exhibit "A" to the Supplemental Affidavit of K. K. Schomp filed herein in the month of December 1960. Throughout the case there also has been repeated reference to the amendment to Article 35, Section 3(c), effective February 1, 1957, an intermediate amendment (which has no application to the circumstances of the instant case).

Under date of March 29, 1960, Mr. J. P. Colyar addressed a letter to Mr. K. K. Schomp, Manager of Personnel of defendant, enclosing a document signed by Mr. Gunther authorizing the Brotherhood of Locomotive Engineers to represent him in handling his alleged grievance to a conclusion. A copy of said letter and authorization, witnessed by Mr. J. P. Colyar on said date, is attached as Exhibit "A" and is incorporated herein. A copy of defendant's reply of April 6, 1960, is attached as Exhibit "B" and incorporated herein. Thereafter, on April 15, 1960, Mr. Colyar met in San Francisco with representatives of defendant, Mr. Denton and me in connection with this matter. Mr. Colyar advised that Exhibits "A" and "B" had been referred to Mr. Decker who was handling the legal portion of the case. The petition, No. 2459-SD-W, was filed with

this Court on September 26, 1960, and was served upon defendant on November 14, 1960. It is apparent that even if Mr. Gunther did not know about the existence of Exhibits "A" through "L", he cannot deny that Mr. Colyar and the Brotherhood of Locomotive Engineers, who were authorized in writing to represent him and who were in communication with Mr. Decker, had all the necessary information [fol. 253] in this regard long before the last petition was even filed in this Court. With due and reasonable diligence Mr. Decker could have developed any such information. There is no basis for the instant motion under Rule 60(b) of the Federal Rules of Civil Procedure.

Page 5, lines 4 through 15, of Mr. Decker's affidavit refers to the last two paragraphs of Article 35 of the orange colored booklet referred to by Mr. Lamprecht and attached as an exhibit to his affidavit. A glance at said booklet will at once demonstrate that the said three-doctor board provision (1) has no application to the circumstances of Mr. Gunther's case, (2) involves only a situation where legal proceedings are instituted, and (3) simply contains the provisions heretofore set forth as Exhibit "B" to the Supplemental Affidavit of Mr. K. K. Schomp filed in support of defendant's motion for summary judgment dated December 1, 1960. The pages of the said orange colored booklet which include the said rule contain the wording "Revised, effective February 1, 1957".

I declare under penalty of perjury that the foregoing is true and correct.

W. A. Gregory.

Dated: San Francisco, California, July 6, 1962.

[fol. 254]

EXHIBIT A TO AFFIDAVIT OF W. A. GREGORY

SD&AE E&F 154-466

[Stamp—C. A. B.—Mar 30 1960]

(Letterhead of Brotherhood of Locomotive Engineers,
General Committee of Adjustment, San Francisco 3, Calif.)

March 29, 1960

Org. File E-13004-35-1 SD&AE
Co. File SD&AE 154-466

Mr. K. K. Schomp (2)
Manager of Personnel
San Diego & Arizona Eastern Ry. Co.
San Francisco, Calif.

Attention—Mr. L. M. Fox, Jr.

Dear Sir:

Please refer to my letter of November 5, 1958, requesting that you advise the date on which Engineer F. J. Gunther was restored to service, in accordance with Award 17646 and the interpretation of the National Railroad Adjustment Board, First Division, and your reply dated November 6, 1958, declining the information for the reason stated therein.

In order to clear up the question of jurisdiction, am enclosing herewith a form certifying the Brotherhood of Locomotive Engineers as Mr. Gunther's representative in handling this case.

In view of this factor, you are now requested to advise whether or not you intend to comply with the Award as interpreted by Referee Stone on October 8, 1958, and reinstate Engineer Gunther and pay him for time lost from October 15, 1955, pursuant to the applicable rule on the property.

While you have advised by your letter (without date) received in this office May 14, 1959, that the defendant Company filed a motion for summary judgment and on April 8, 1959, the Federal Court at San Diego granted such a judgment, we understand such judgment was against the Award itself dated October 2, 1956, and not the interpretation dated October 8, 1958.

Yours truly,

/s/ J. P. COLYAR

[fol. 255]

San Francisco, California
(Location)

March 28, 1960
(Date)

Docket No. 33531—Award 17646 and
interpretation
N. R. A. Board, First Division

TO WHOM IT MAY CONCERN :

I hereby authorize the Brotherhood of Locomotive Engineers and any and all of its duly constituted representatives to represent me in handling to a conclusion the following grievance, submitted by me through Division No. 515 of the Brotherhood of Locomotive Engineers, with any and all representatives of the San Diego and Arizona Eastern Railway Company, and hereby grant full and complete authority to the said Brotherhood of Locomotive Engineers and its representatives to act for me and in my name for the purpose of collecting, settling, compromising, amending, dismissing or in any other manner disposing of such grievance; and, further, I hereby authorize the said Brotherhood of Locomotive Engineers and its representatives to submit such grievance for determination to any person, board or other tribunal provided by law or otherwise, which to them may be deemed necessary or advisable, and hereby give full and complete authority to the said Brotherhood of Locomotive Engineers and its representatives to receive notice of hearings, if any, or to waive hearings, and to ap-

pear for, represent and act for me before such person, board or other tribunal in connection with the consideration and determination of such grievance:

STATEMENT OF CLAIM OR COMPLAINT

Request the enforcement of Award 17646 of the National Railroad Adjustment Board, First Division, as interpreted.

/s/ FRED J. GUNTHER
(Signature of Claimant)
Member of 97, BLF&E
Mar 28 1960

Witness

/s/ J. P. COLYAR
(Signature of Claimant)
3/28/60

[fol. 256]

EXHIBIT B TO AFFIDAVIT OF W. A. GREGORY

COPY

(SD&AE Letterhead)

65 Market Street
San Francisco, California

Manager of Personnel

Org. File E-13004-35-1 SD&AE
Co. File SD&AE E&F 154-466

April 6, 1960

Mr. J. P. Colyar, General Chairman
Brotherhood of Locomotive Engineers
Pacific Building
San Francisco 3, California

Dear Sir:

This is in reply to your letter of March 29, 1960, with which you enclosed a form signed by Mr. F. J. Gunther authorizing you to act on his behalf in "requesting enforce-

ment of Award 17646 of the National Railroad Adjustment Board, First Division, as interpreted". As you point out in your letter, on April 8, 1959, the Federal Court at San Diego granted summary judgment in favor of the defendant company on Award 17646. I am advised by counsel that the so-called "Interpretation", which was subsequently issued by the Board under the same number and involves the same subject matter, is necessarily a part of the case which Mr. Gunther submitted to the court. In fact, Mr. Gunther represented, through his attorneys, to the court that he would make the "Interpretation" a part of the enforcement proceeding. As you know, the "Interpretation" was progressed and released without affording the Carrier proper notice or opportunity to be heard, as is required by the Railway Labor Act, and consequently it could not be regarded as valid in any event.

As I pointed out in my letter to you of May 13, 1959, in reply to yours of May 8, 1959, this matter was presented to the court and has been disposed of by final judgment. In view of these facts, there is no Award outstanding with which the Company has not complied.

Very truly yours,

(Signed) K. K. SCHOMP
(CAB)

[fol. 257] Declaration of service by mail (omitted in printing).

[fol. 258]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION
Civil No. 2459-SD-W

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP—
Filed July 23, 1962

State of California,
City and County of San Francisco, ss.

K. K. Schomp, being first duly sworn, deposes and says:

This supplements the affidavit made by me on July 6, 1962, and filed in this proceeding in opposition to Petitioner's Notice of Motion and Motion for Relief from Final Judgment in the above-entitled action.

As I stated in the aforementioned affidavit and in my prior affidavits of November 23 and 30, 1960, and May 11, 1961, there was no provision for a three-doctor panel in the collective bargaining agreement as of December 30, 1954, applicable to the facts of Mr. Gunther's case. The first such applicable provision for a three-doctor panel was agreed upon on December 1, 1959, which agreement is [fol. 259] attached as Exhibit "A" to my affidavit of July 6, 1962.

It is true that a three-doctor panel was created by agreement between the engineers represented by the Brotherhood of Locomotive Engineers (BLE) and the Southern Pacific Company (SP) in the November 13, 1947, letter agreement (Exhibit "L" to Mr. Colyar's affidavit, hereinafter referred to as the "Burbank letter," which is the same as his Exhibit "K" for the purposes hereof). But this is very different from any claim that an agreement between SP and its engineers represented by BLE (SP engineers'

[File endorsement omitted]

agreement) is the same as an agreement between San Diego and Arizona Eastern Railway Company (SD&AE) and its employees represented by BLE (SD&AE engineers' agreement). A copy of the SP-BLE agreement is attached as Exhibit "A" hereto. The SP engineers' agreement applies only to employees of SP while the SD&AE engineers' agreement applies only to employees of SD&AE, and neither applies as such to employees of the other company. Thus, the rates of pay, rules and working conditions relating to engineers of each company are prescribed by its own said agreement. For example, engineers on SD&AE have seniority solely on their own SD&AE seniority roster and no seniority rights on SP by reason of their length of service on SD&AE. Since he entered the service of SD&AE Mr. Gunther's name never at any time appeared on any SP engineers' roster and he never during said period had any right to exercise seniority on SP. In a like manner SP engineers have seniority solely on their own SP seniority roster and no seniority rights on SD&AE by reason of their length of service on SP.

SD&AE is a wholly owned subsidiary of SP and its directors and non-operating officers and its Vice President and General Manager at Los Angeles, California, also hold official positions on SP. For example, I am Manager of Personnel of each company. The two companies are separate operations and the employees subject to any collective [fol. 260] bargaining agreement of one company do not hold seniority or obtain any rights on the other company by reason of their said agreement. This is apparent from a reading of the SP and SD&AE engineers' agreements which are exhibits in this case.

For many years prior to May 30, 1945, the craft or class of Locomotive Engineers on the SD&AE was represented by the BLE, a railway labor organization, national in scope, which as of April 5, 1960, represented its members under 283 collective bargaining agreements on most American railroads. Whenever there is a dispute as to the representative to be selected, the representative organization is selected in the manner set forth in Section 2 Ninth of the

Railway Labor Act and is certified by the National Mediation Board. On May 30, 1945, as will be noted by referring to Sheet 1, Exhibit "B", attached to this affidavit, Mr. H. R. Gernreich, Vice President and General Manager, SD&AE, Mr. A. Johnston, Grand Chief Engineer, BLE, and Mr. D. B. Robertson, President, Brotherhood of Locomotive Firemen and Enginemen (BLF&E), were advised jointly by Mr. Robert F. Cole, Secretary, National Mediation Board, that the said Board was in receipt of an application from the BLF&E to investigate a representation dispute among the locomotive engineers of the SD&AE. Following an election conducted by the National Mediation Board, that Board under date of February 6, 1946, (Sheet 2, Exhibit "B") issued its Certification in Case No. R-1488 certifying that at the time application was received, locomotive engineers were represented by the BLE and that on the basis of the investigation and report of election no change in representation was desired by these employees.

Under date of May 5, 1950, another application was submitted to the National Mediation Board by the BLF&E for investigation of a representation dispute under the provisions of Section 2 Ninth of the Railway Labor Act with respect to the locomotive engineers of the SD&AE. Exhibit "C", Sheets 1 and 2, attached hereto, documents the [fol. 261] application, and Certification by the National Mediation Board which indicates that no change was made in the representation by the BLE of the craft or class of Locomotive Engineers.

Certification of a representative of a particular craft or class of employees on the SD&AE pursuant to Section 2 Ninth of the Railway Labor Act has no effect on the representation of the same craft or class of employees on any other railroad, including the SP. Thus, at the time the elections above referred to were held, no question was raised concerning representation of engineers of SP or that the two groups should be voted as one. Under date of July 31, 1958, the BLE was certified by the National Mediation Board in Case No. R-3284 as the duly authorized representative of the craft or class of Locomotive Firemen,

Hostlers and Hostler Helpers of the SD&AE. At that time, the craft or class of Locomotive Firemen, Hostlers, and Hostler Helpers of SP was represented for collective bargaining purposes under the Railway Labor Act and in accordance with Section 2 Ninth of the said Act by the BLF&E. That craft had been represented for many years prior to that time by the said BLF&E and is presently represented by that organization.

At the present time the craft or class of Locomotive Firemen, Hostlers and Hostler Helpers, employees of the SD&AE, continues to be represented by the BLE under National Mediation Board certification in Case No. R-3284 above referred to.

It is not uncommon that there may be more than one agreement in effect on a particular railroad covering the same craft but involving different groups in the craft. On SP (Pacific Lines) there are three agreements with BLE; namely, one covering the craft of Locomotive Engineers on the SP (Pacific Lines); one covering engineers on the portion of the lines now referred to as the former El Paso and Southwestern Railway System; and one covering engineers employed in Nogales, Arizona, Yard. These agreements are administered individually and separately.

[fol. 262] The agreement covering engineers on the SD &AE is administered without regard to any other agreement covering the craft of locomotive engineers. This is evidenced by the fact that when changes in the rates of pay, rules or working conditions of said agreement are desired, a notice pursuant to Section 6 of the Railway Labor Act, referring solely to that agreement and the appropriate Article of the agreement itself, is required. For example, in case of request on the part of the BLE for increase in wages, notices are served separately as to each agreement that may be involved. Absent such notice for any one of the agreements involved, the only agreements which will be changed by settlement of the Section 6 notices, will be those for which the notices were served.

Attached as Exhibits "D", "E", "F" and "G" are copies of notices dated March 2, 1959, served by the BLE for changes in agreements, effective November 1, 1959. It will be noted that separate notices were served on behalf of the SD&AE (Exhibit "D"); SP (Pacific System) Exhibit "E"; former El Paso and Southwestern (Exhibit "F"); and Nogales, Arizona Yard (Exhibit "G").

The agreement ultimately reached in settlement of the demands covered by the Section 6 notices (Exhibits "D", "E", "F" and "G") is dated June 6, 1960, and is between participating carriers represented by the Eastern, Western and Southeastern Carriers' Conference Committees and the locomotive engineers (motormen) of such carriers represented by the BLE through their conference committee.

Said agreement contains the following:

"Article VIII—Effect of This Agreement

"This Agreement is made for the purpose of implementing the Award of Arbitration Board No. 254 dated June 3, 1960, disposing of the dispute growing out of notices served on the carriers listed in Exhibits A, B and C on or about March 2, 1959 and the notices served by said carriers on the employees represented by the Brotherhood of Locomotive Engineers on or about March 20, 1959 pursuant to the provisions of said Award of June 3, 1960, and shall be construed as a separate Agreement by and on behalf of each of said carriers and its employes represented by the organization signatory hereto.

[fol. 263] "SIGNED AT CHICAGO, ILLINOIS, THIS SIXTH DAY OF JUNE, 1960." (Emphasis added)

SP (Pacific Lines) and the SD&AE are listed as individual carriers, parties to said agreement.

The collective agreements themselves by their very identification on the covers and in the preambles identify the specific engineers to whom they relate.

The preamble of the SD&AE agreement reads as follows:

"Agreement

"Between San Diego & Arizona Eastern Railway Company and General Committee of Adjustment of Brotherhood of Locomotive Engineers of the San Diego & Arizona Eastern Railway Company.

"It is hereby understood and agreed between the Management of the San Diego & Arizona Eastern Railway Company and its Locomotive Engineers represented by the General Committee of Adjustment of Brotherhood of Locomotive Engineers, that the following rules and regulations covering rates of pay and working conditions of engineers on the San Diego & Arizona Eastern Railway Company, shall be in effect on and after January 1, 1956.

"Revised Rates of Pay effective October 1, 1955."

The preamble of the SP engineers' agreement reads as follows:

"Agreement

"It is hereby agreed by and between the Southern Pacific Company (Pacific Lines), excluding the former El Paso and Southwestern System, and its locomotive engineers represented by the General Committee of Adjustment of the Brotherhood of Locomotive Engineers, that the following rules and regulations shall govern the rates of pay and working conditions of locomotive engineers on the Southern Pacific (Pacific Lines), excluding the former El Paso and Southwestern System, effective as of August 1, 1958."

That the separate agreements covering engineers of the SD&AE and the SP (Pacific Lines) are administered, revised or amended individually is further confirmed by Exhibit "H" attached hereto and made a part of this affidavit. For example, by referring to Exhibit "H" it will be noted that with respect to Article 6, Section 3, it was de-

sired by the BLE to incorporate into SD&AE engineers' [fol. 264] agreement Southern Pacific settlements (agreement provisions) covered by files E-11832; E&F 1-45-550; and E-01104; E&F 2-76. With respect to Article 9, Section 1 b, organization desired to incorporate SP Section 1 b. of Article 12 into SD&AE engineers' agreement.

Failure of the parties to agree on the incorporation into the SD&AE engineers' agreement of any of the requests in Exhibit "H" would have resulted in that provision not becoming a part of the SD&AE engineers' agreement.

The collective agreement covering engineers on SD&AE is administered and interpreted individually and separately from the collective agreement covering engineers of the SP (Pacific Lines). This is established by the fact that two separate Special Adjustment Boards authorized by the National Mediation Board have been established, one on the SP to handle and dispose of grievances arising out of the interpretation or application of the rules contained in the SP engineers' agreement (with no jurisdiction on SD&AE agreement matters), and one on SD&AE to perform the same function as to the SD&AE engineers' agreement (with no jurisdiction on SP agreement matters).

Additional evidence of recognition that settlements made in connection with one agreement do not automatically apply to other agreements is provided by Exhibit "I" attached hereto, reproducing copy of General Chairman J. P. Colyar's letter addressed to me in my capacity as Manager of Personnel, SD&AE, requesting the adoption on SD&AE of the settlement therein referred to. It is well to note that the settlement referred to is dated August 21, 1934, and it was not until September 22, 1961, that the adoption of such settlement was requested for the SD&AE. Thus, it is clear that settlements relating to a particular agreement do not apply to another agreement unless specific and separate action is taken to so apply them.

[fol. 265] SP is incorporated in Delaware. SD&AE is incorporated in Nevada. Each reports separately to the Interstate Commerce Commission on numerous subjects, including numbers and classes of employees, payrolls, in-

come, tonnage hauled, hours of service of employees, etc. Each company is a common carrier engaged in transportation for hire, as that term is defined in Section 1(3)(a) of the Interstate Commerce Act (49 U.S.C. Sec. 1(3)(a)).

SP (Pacific Lines) operates some 12,046.19 miles of trackage in the states of California, Texas, Arizona, New Mexico, Nevada, Utah and Oregon. SD&AE operates only in California between El Centro and San Diego in conjunction with the Tijuana and Tecate Railway Company, which operates through a portion of Mexico. Exhibit "J" hereto is a map of the SD&AE and Tijuana and Tecate lines of railroad.

K. K. Schomp

Subscribed and sworn to before me this 20th day of July, 1962.

Norman T. Stone, Notary Public in and for the City and County of San Francisco, State of California.

[fol. 266]

CLERK'S NOTE

Exhibit A to Supplemental affidavit of K. K. Schomp "Agreement by and between Southern Pacific Company (Pacific Lines) (Excluding the former El Paso and Southwestern System) and its Locomotive Engineers Represented by the General Committee of Adjustment of the Brotherhood of Locomotive Engineers effective August 1, 1958" (omitted in printing).

[fol. 267]

EXHIBIT B TO SUPPLEMENT AFFIDAVIT OF K. K. SCHOMP

Sheet 1

NATIONAL MEDIATION BOARD

WASHINGTON (25)

[Handwritten notation—E-3006-5-6—BLE]

May 30, 1945

Mr. H. R. Gernreich
Vice President & General Manager
San Diego & Arizona Eastern Railway Company
45 Twelfth Avenue
San Diego, California

Mr. A. Johnston, Grand Chief Engineer
Brotherhood Locomotive Engineers
Cleveland, Ohio

Mr. D. B. Robertson, President
Brotherhood of Locomotive Firemen & Enginemen
318 Keith Building
Cleveland, Ohio

Gentlemen:

This Board is in receipt of an application from the Brotherhood of Locomotive Firemen & Enginemen for the investigation of a representation dispute among the following described employees of the San Diego and Arizona Eastern Railway:

Engineers

It will be appreciated if Mr. Gernreich will advise the Board the number of employees in this group now in the service of the company.

The Board's records show that these employees are now represented by the Brotherhood Locomotive Engineers, and

any statement which Mr. Johnston wishes to make in connection with the application will be appreciated.

Very truly yours,

/s/ ROBERT F. COLE

Robert F. Cole

Secretary

[Stamp—San Diego & Arizona Eastern Railway Co.—
Jun 5 1945—Operating Department]

PLEASE MAKE SUBMISSION AND REPLY
TO CORRESPONDENCE IN DUPLICATE

[fol. 268]

Sheet 2

COPY

NATIONAL MEDIATION BOARD

WASHINGTON

[Stamp—E. A.—Feb 27 1946]

CASE No. R-1488

Certification

February 6, 1946

In the matter of

REPRESENTATION OF EMPLOYEES

of the

SAN DIEGO AND ARIZONA EASTERN RAILWAY COMPANY
Locomotive Engineers

The services of the National Mediation Board were invoked by the Brotherhood of Locomotive Firemen and Enginemen to investigate and determine who may represent locomotive engineers, employed by the San Diego and Arizona Eastern Railway Company, for the purposes of

the Railway Labor Act, as provided by Section 2, Ninth, thereof.

At the time application was received these employees were represented by the Brotherhood of Locomotive Engineers.

The Board assigned Mr. H. Albert Smith, Mediator, to conduct investigation and, after finding that a dispute existed among the employees concerned, directed him to take a secret ballot to determine their choice, using an eligible list agreed to by representatives of the contesting organizations.

Following is the result of the election as reported by the mediator, and attested to on February 1, 1946, by representatives of the contesting organizations who acted as observers:

Number of employees voting:

For Brotherhood of Locomotive Engineers	For Brotherhood of Locomotive Firemen	Number of employees eligible
Locomotive Engineers 12	10	22

On the basis of the investigation and report of election, the National Mediation Board hereby certifies that no change in representation is desired by these employees.

By order of the NATIONAL MEDIATION BOARD.

Robert F. Cole
Secretary

[fol. 268½]

EXHIBIT C TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

Sheet 1

NATIONAL MEDIATION BOARD

WASHINGTON (25)

May 5, 1950

Mr. H. R. Gernreich, Vice Pres. & Gen. Mgr.
San Diego & Arizona Eastern Railway Company
Pacific Electric Building
Los Angeles 14, California

Mr. A. Johnston, Grand Chief Engr.
Brotherhood of Locomotive Engineers
1118 BLE Building
Cleveland, Ohio.

Gentlemen:

We have an application from the Brotherhood of Locomotive Firemen and Enginemen for investigation of a representation dispute, under the provisions of Section 2, Ninth, of the Railway Labor Act, involving the following employees of the San Diego & Arizona Eastern Railway Company:

Locomotive engineers

Mr. Gernreich is requested to please furnish the number of employees covered by the above application. We shall also appreciate receiving any other statement he may care to make regarding this matter.

Records of the Board show these employees are now represented by the Brotherhood of Locomotive Engineers.

Accordingly, Mr. Johnston is requested to state the position of his organization in this matter.

Very truly yours,

/s/ T. E. BICKERS
Thomas E. Bickers
Secretary

cc: Mr. D. B. Robertson, Int'l. Pres.
Brotherhood of Locomotive Firemen & Enginemen
318 Keith Building
Cleveland, Ohio

PLEASE MAKE SUBMISSION AND REPLY TO
CORRESPONDENCE IN DUPLICATE

[fol. 269]

Sheet 2

NATIONAL MEDIATION BOARD

WASHINGTON

CASE No. R-2294

Certification

September 29, 1950

In the matter of

REPRESENTATION OF EMPLOYEES

of the

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY
Locomotive Engineers

The services of the National Mediation Board were invoked by the Brotherhood of Locomotive Firemen and Enginemen, to investigate and determine who may represent for purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, the craft or class of locomotive engineers, employees of the San Diego & Arizona Eastern Railway Company.

At the time application was received these employees were represented by the Brotherhood of Locomotive En-

gineers, under a certificate issued by the Board on February 6, 1946, Case No. R-1488.

The Board assigned Mediator Wm. F. Mitchell, Jr. to investigate, and after finding that a dispute existed among the employees concerned, directed him to conduct an election by secret ballot to determine their choice using an eligible list agreed to by representatives of the contesting organizations.

Following is the result of the election as reported by the Mediator and attested on September 19, 1950, by representatives of the contesting organizations who acted as observers:

Number of employees voting:

Brotherhood of Locomotive Engineers	Brotherhood of Locomotive Firemen & Enginemen	Number Employees Eligible
Locomotive Engineers 9	8	17

FINDINGS AND CERTIFICATION

The Mediation Board, upon the whole record and the report of the Mediator, finds that the carrier and the employees in this case are, respectively, a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties were given due notice of investigation, whereupon the Mediation Board hereby certifies that:

[fol. 269½] The Brotherhood of Locomotive Engineers has been duly designated and authorized to continue to represent for purposes of the Railway Labor Act, the craft or class of locomotive engineers, employees of the San Diego and Arizona Eastern Railway Company, its successors and assigns.

By order of the NATIONAL MEDIATION BOARD.

/s/ T. E. BICKERS
Thomas E. Bickers
Secretary

[fol. 270]

EXHIBIT D TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

[Stamps—C. A. B.—Mar 3 1959—L. M. F.—Mar 4 1959
—E. P. A.—Mar 4 1959]

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

San Francisco,
California
(City and State)

March 2, 1959

Org. File E-19605-68 SD&AE

Mr K. K. Schomp (2)
Manager of Personnel
Title

ATTENTION: Mr. L. M. Fox, Jr.
San Diego & Arizona Eastern
Name of Carrier

65 Market Street
San Francisco 5, California
Address

Dear Sir:

In accordance with the provisions of the Railway Labor Act, as amended, and the agreement or agreements now in effect on the San Diego & Arizona Eastern Railroad, particularly Article XI of the National Mediation Agreement, Case No. A-5464, (engineers, motormen) and/or Article VIII of the National Agreement (firemen, helpers, hostlers and hostler helpers) both dated July 18, 1957, please accept this as formal notice of our desire to change, effective November 1, 1959, the provisions of said agreement or agreements governing rates of pay for any and all of the employes on said railroad who are represented by the Brotherhood of Locomotive Engineers as follows:

1. The cost-of-living allowances in effect November 1, 1959, shall be included and made a part of existing basic rates of pay.

2. The cost-of-living adjustment provisions will be continued in effect with appropriate revisions in paragraphs (a), (b), (c), and (f) to reflect a new Consumers' Price Index base which shall be the index as of September, 1959.

3. Basic daily rates in effect November 1, 1959, as revised by Item 1, will be increased 12 per cent.

4. All arbitraries, miscellaneous rates, special allowances, monthly and daily guarantees in effect November 1, 1959 will be increased by 12 per cent.

Like notice is being served on other carriers on a national basis in accordance with Article XI of the National Mediation Agreement in Case No. A-5464, dated July 18, 1957, and Article VIII of the National Agreement of the same date.

It is the desire of the undersigned that conference with respect to the subject matter of this notice be held at the earliest practicable date within thirty (30) days after receipt of this notice, and that within ten (10) days after receipt of this notice you suggest in writing to the undersigned the time and place for the beginning of such conference, in accordance with the provisions of the Railway Labor Act, as amended.

[fol. 271] In event settlement is not reached in conference, please advise promptly in accordance with the above-mentioned agreements the names of the carriers' conference committee who will represent your carrier to meet and dispose of this question with a like committee of this organization.

It is further a part of the requests herein made that all lines or divisions of railway operated or controlled by the

San Diego & Arizona Eastern Railroad shall be included in the settlement of this proposal, and that any agreement reached shall apply alike to all such lines of railway.

Very truly yours,

/s/ J. P. COLYAR

General Chairman

General Committee of Adjustment of the
Brotherhood of Locomotive Engineers.

[fol. 272]

EXHIBIT E TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

188-63

[Stamps—C. A. B.—Mar 3 1959—L. M. F.—Mar 6 1959
—E. P. A.—Mar 6 1959]

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

San Francisco,

California

(City and State)

March 2, 1959

Org. File E-19605-36 SP

Mr K. K. Schomp (2)

Manager of Personnel

Title

Southern Pacific Company (Pacific System)

Name of Carrier

65 Market Street

San Francisco 5, California

Address

Dear Sir:

In accordance with the provisions of the Railway Labor Act, as amended, and the agreement or agreements now

in effect on the Southern Pacific Co. (Pacific System) Railroad, particularly Article XI of the National Mediation Agreement, Case No. A-5464, (engineers, motormen) and/or Article VIII of the National Agreement (firemen, helpers, hostlers and hostler helpers) both dated July 18, 1957, please accept this as formal notice of our desire to change, effective November 1, 1959, the provisions of said agreement or agreements governing rates of pay for any and all of the employes on said railroad who are represented by the Brotherhood of Locomotive Engineers as follows:

1. The cost-of-living allowances in effect November 1, 1959, shall be included and made a part of existing basic rates of pay.

2. The cost-of-living adjustment provisions will be continued in effect with appropriate revisions in paragraphs (a), (b), (c), and (f) to reflect a new Consumers' Price Index base which shall be the index as of September, 1959.

3. Basic daily rates in effect November 1, 1959, as revised by Item 1, will be increased 12 per cent.

4. All arbitraries, miscellaneous rates, special allowances, monthly and daily guarantees in effect November 1, 1959 will be increased by 12 per cent.

Like notice is being served on other carriers on a national basis in accordance with Article XI of the National Mediation Agreement in Case No. A-5464, dated July 18, 1957, and Article VIII of the National Agreement of the same date.

It is the desire of the undersigned that conference with respect to the subject matter of this notice be held at the earliest practicable date within thirty (30) days after receipt of this notice, and that within ten (10) days after receipt of this notice you suggest in writing to the undersigned the time and place for the beginning of such con-

ference, in accordance with the provisions of the Railway Labor Act, as amended.

[fol. 273] In event settlement is not reached in conference, please advise promptly in accordance with the above-mentioned agreements the names of the carriers' conference committee who will represent your carrier to meet and dispose of this question with a like committee of this organization.

It is further a part of the requests herein made that all lines or divisions of railway operated or controlled by the Southern Pacific Co. (Pac. System) Railroad shall be included in the settlement of this proposal, and that any agreement reached shall apply alike to all such lines of railway.

Very truly yours,

/s/ J. P. COLYAR

General Chairman

General Committee of Adjustment of the
Brotherhood of Locomotive Engineers.

[fol. 274]

EXHIBIT F TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

188-67

[Stamps—C. A. B.—Mar 3 1959—L. M. F.—Mar 4 1959
—E. P. A. Mar 4 1959]

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

San Francisco,
California
(City and State)

March 2, 1959

Org. File E-19605-30 EP&SW

Mr K. K. Schomp (2)
Manager of Personnel
Title

Former El Paso & Southwestern
Name of Carrier

65 Market Street
San Francisco 5, California
Address

Dear Sir:

In accordance with the provisions of the Railway Labor Act, as amended, and the agreement or agreements now in effect on the former El Paso & Southwestern Railroad, particularly Article XI of the National Mediation Agreement, Case No. A-5464, (engineers, motormen) and/or Article VIII of the National Agreement (firemen, helpers, hostlers and hostler helpers) both dated July 18, 1957, please accept this as formal notice of our desire to change, effective November 1, 1959, the provisions of said agreement or agreements governing rates of pay for any and

all of the employees on said railroad who are represented by the Brotherhood of Locomotive Engineers as follows:

1. The cost-of-living allowances in effect November 1, 1959, shall be included and made a part of existing basic rates of pay.

2. The cost-of-living adjustment provisions will be continued in effect with appropriate revisions in paragraphs (a), (b), (c), and (f) to reflect a new Consumers' Price Index base which shall be the index as of September, 1959.

3. Basic daily rates in effect November 1, 1959, as revised by Item 1, will be increased 12 per cent.

4. All arbitraries, miscellaneous rates, special allowances, monthly and daily guarantees in effect November 1, 1959 will be increased by 12 per cent.

Like notice is being served on other carriers on a national basis in accordance with Article XI of the National Mediation Agreement in Case No. A-5464, dated July 18, 1957, and Article VIII of the National Agreement of the same date.

It is the desire of the undersigned that conference with respect to the subject matter of this notice be held at the earliest practicable date within thirty (30) days after receipt of this notice, and that within ten (10) days after receipt of this notice you suggest in writing to the undersigned the time and place for the beginning of such conference, in accordance with the provisions of the Railway Labor Act, as amended.

[fol. 275] In event settlement is not reached in conference, please advise promptly in accordance with the above-mentioned agreements the names of the carriers' conference committee who will represent your carrier to meet and dispose of this question with a like committee of this organization.

It is further a part of the requests herein made that all lines or divisions of railway operated or controlled by the former El Paso & Southwestern Railroad shall be included in the settlement of this proposal, and that any agreement reached shall apply alike to all such lines of railway.

Very truly yours,

/s/ J. P. COLYAR

General Chairman

General Committee of Adjustment of the
Brotherhood of Locomotive Engineers.

[fol. 276]

EXHIBIT G TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

San Francisco,
California

(City and State)

March 2, 1959

Org. File E-19605-31 SP of MEX.

Mr K. K. Schomp (2)

Manager of Personnel

Title

Southern Pacific Railroad of
Mexico, Nogales Yard, Nogales, Arizona

Name of Carrier

65 Market Street

San Francisco 5, California

Address

Dear Sir:

In accordance with the provisions of the Railway Labor Act, as amended, and the agreement or agreements now in

effect on the Sou. Pac. RR of Mexico, Nogales Yard Railroad, particularly Article XI of the National Mediation Agreement, Case No. A-5464, (engineers, motormen) and/or Article VIII of the National Agreement (firemen, helpers, hostlers and hostler helpers) both dated July 18, 1957, please accept this as formal notice of our desire to change, effective November 1, 1959, the provisions of said agreement or agreements governing rates of pay for any and all of the employes on said railroad who are represented by the Brotherhood of Locomotive Engineers as follows:

1. The cost-of-living allowances in effect November 1, 1959, shall be included and made a part of existing basic rates of pay.

2. The cost-of-living adjustment provisions will be continued in effect with appropriate revisions in paragraphs (a), (b), (c), and (f) to reflect a new Consumers' Price Index base which shall be the index as of September, 1959.

3. Basic daily rates in effect November 1, 1959, as revised by Item 1, will be increased 12 per cent.

4. All arbitraries, miscellaneous rates, special allowances, monthly and daily guarantees in effect November 1, 1959 will be increased by 12 per cent.

Like notice is being served on other carriers on a national basis in accordance with Article XI of the National Mediation Agreement in Case No. A-5464, dated July 18, 1957, and Article VIII of the National Agreement of the same date.

It is the desire of the undersigned that conference with respect to the subject matter of this notice be held at the earliest practicable date within thirty (30) days after receipt of this notice, and that within ten (10) days after receipt of this notice you suggest in writing to the undersigned the time and place for the beginning of such conference, in accordance with the provisions of the Railway Labor Act, as amended.

[fol. 277] In event settlement is not reached in conference, please advise promptly in accordance with the above-mentioned agreements the names of the carriers' conference committee who will represent your carrier to meet and dispose of this question with a like committee of this organization.

It is further a part of the requests herein made that all lines or divisions of railway operated or controlled by the SP RR of Mexico at Nogales Railroad shall be included in the settlement of this proposal, and that any agreement reached shall apply alike to all such lines of railway.

Very truly yours,

/s/ J. P. COLYAR
General Chairman

General Committee of Adjustment of the
Brotherhood of Locomotive Engineers.

[fol. 278]

EXHIBIT H TO SUPPLEMENTAL AFFIDAVIT
OF K. K. SCHOMP

[Handwritten—E&F 2-245]

(Letterhead of Brotherhood of Locomotive Engineers,
General Committee of Adjustment)

January 26, 1955

Org. File E-10386-68 SD&AE

Mr. P. D. Robinson (2)
Vice President and General Manager
San Diego & Arizona Eastern Railway Co.
Los Angeles 14, California

Dear Sir:

Pursuant to and in accordance with Article 68 of the agreement covering engineers, dated November 30, 1938, it is our desire to reprint the agreement.

In order to bring it up to date, the settlements and agreements set forth hereafter should be applied to present rules or corrections made, whichever is applicable.

Article 1, Section 1(a) —Extend rates. *Done*

Section 1(c) —Make corrections to meet Section 7 of the Washington agreement dated August 11, 1948. *Done*

Section 2(a) —Correct guarantee. *Done*

Article 2; Section 2(a) —Extend rates. *Done*

Article 3—No change.

Article 4, Section 1 —Correct language to be compatible with Section 16, Washington Agreement dated August 11, 1948. *Done*

Article 5, Section 1(a) —Incorporate agreements covered by:

S.P. file E-6533-6-3(a); E&F 191-279.

S.P. file E-7566-6-3(a); E&F 178-61 as amended by E&F 2-157; see your file E&F 178-16, our file E-12669-5-1(a). *Done*

Article 6, Section 3 —Apply Southern Pacific settlements covered by files:

E-11832; E&F 145-550

E-01104; E&F 2-76 *Done*

[fol. 279]

Article 7, Section 3(b) —Amend by adopting agreement dated December 19, 1944, Org. file E-10386, Co. file E&F 2-7. *Done*

Section 9 —Incorporate the letter of agreement dated June 8, 1950, Org. file E-13003-7-9, Co. file E&F 1-23. *Done*

Article 8, Section 1(a) —Extend rates. *Done*

Section 1(c) —Make changes to conform with Section 9, Washington agreement dated August 11, 1948. *Done*

Article 9, Section 1(b) —Adopt Southern Pacific Section 1(b) of Article 12; also see E&F 2-7. *Done*

Section 1(c) —Adopt Southern Pacific Section 1(c) of Article 12 as amended by S.P. file E&F 2-134, Org. file E-16609. *Done*

Section 1(d) —Adopt Southern Pacific Section 1(d) of Article 12, including last paragraph. *Done*

Section 5 —Adopt settlement covered by S.P. file E&F 61-1361, Org. file E-11579. *Done*

Article 10—No change.

Article 11—No change.

Article 12, Section 5 —Adopt Section 5 of Article 15 of Southern Pacific Agreement, including all examples. *Done*

Section 6 —Make new section incorporating Southern Pacific settlement covered by our file E-16300, Co. file E&F 2-135. 1(155-604) *Done*

Section 7 —Combine present Sections 6 and 7 and incorporate Southern Pacific

settlement covered by our file
E-16301, Co. file E&F 2-136.
1(155-604) Done

Section 9 —Eliminate.

Article 13—No change.

Article 14, Section 4 —Incorporate agreement dated July
18, 1945, file E-0518, your file E&F
2-4. *Done*

Section 4 —Adopt Southern Pacific settlement
covered by our file E-11516, Co.
file E&F 191-437. *Done*

[fol. 280]

Article 15, Section 1(b)—Follow by incorporating the Notes
1 and 2, Co. file E&F 2-7, Org. file
E-10386. *Done*

Article 16—No change.

Article 17—No change.

Article 18, Section 1 —Adopt Southern Pacific settlement,
Org. file E-16303, Co. file E&F
2-137. *1(157-19)10 Done*

Section 2 —Incorporate settlement dated
April 25, 1951, Co. file E&F 1-28,
Org. file E-13308. Eliminate ques-
tion. *Done*

New Section 3 —Adopt Southern Pacific settle-
1(157-19)11
ment, Co. file E&F 2-138 [^],
Org. file E-16303. *Done*

Article 19—No change.

Article 20—No change.

- Article 21, Section 1 — Incorporate Section 14, Washington Agreement dated August 11, 1948. *Done*
- Section 2 — Incorporate Section 14, Washington Agreement dated August 11, 1948. *Done*
- Section 3 — Incorporate Section 14, Washington Agreement dated August 11, 1948. *Done*
- Section 4 — Incorporate Section 14, Washington Agreement dated August 11, 1948. *Done*
- Section 5 — Incorporate Section 14, Washington Agreement dated August 11, 1948. *Done*
- Section 6 — Present Section 1(c). *Done*

Article 22—No change.

- Article 23, Section 1 — Adopt Southern Pacific settlement, Org. file E-16536, Co. file E&F 2-162. 1(157-19)9 *Done*
- Section 2 — Adopt Southern Pacific rule, Article 27, Section 2. *Done*
- Section 3 — Adopt Southern Pacific rule, Article 27, Section 3. *Done*
- Section 4 — Adopt Southern Pacific rule, Article 27, Section 4. *Done*

[fol. 281]

- Article 24 — Incorporate agreement dated June 27, 1950, Org. file E-13004, Co. file E&F 1-24. *Done*

- Article 25, Section 1 — No change.
- Section 2 — No change.

Section 3(a)—Incorporate letter of agreement dated October 27, 1942, Co. file 081-SD&AE/013-223, Orig. file E-8850. *Done*

Section 3(b)—Incorporate letter of agreement dated August 17, 1945, Co. file SD&AE E&F 1-1, Org. file E-8959. *Done*

Section 3(c)—Incorporate letter of agreement dated June 17, 1948, Co. file E&F
Done

1-14, Org. file E-11706 ^ and letter of agreement March 2, 1951, same files. *Considered not necessary to show in Agreement.*

Section 3(d)—Incorporate letter of agreement dated May 8, 1944, Co. file E&F 013-223, Org. file E-0515-25. *Done*

Article 26 —New paragraph, letter of agreement dated May 8, 1944, Co. file E&F 013-223, Org. file E-0516-26. *Done*

Article 27, Section 2 —Incorporate first part of Memorandum of Agreement dated May 1, 1951, Co. file E&F 1-26, Org. file 13410-27. No assignment rule to substitute for present Section 2 of Article 27. *Done*

Section 4 —Change to read 30 hours instead of 72 hours. *Done*

Article 28—No change.

Article 29—No change.

Article 30—No change.

Article 31—No change.

Article 32, Section 1 —Incorporate Memorandum of Agreement dated September 15, 1950, Co. file E&F 1-25, Org. file E-12947-32. *Done*

Section 2 —Incorporate Item 1 of Mediation
1(2-18)
Case A-2602, ^ Org. file E-7535.
Apply S.P. file E-13050, Co. file
E&F 2-154. ~~1(2-18)~~ 1(157-19)12
Done

Section 3 —Incorporate Item 9 of Mediation
Case A-2602, Org. file E-7535.

^
1(2-18)

Article 33—No change.
[fol. 282]

Article 34—No change.

Article 35—No change.

Article 36—No change.

Article 37—No change.

Article 38 —Substitute Mediation Agreement
A-1758 dated November 22, 1944,
Org. file E-6235, Co. file E&F
~~111~~-5. *Done*
1-8

Article 39 —Substitute Mediation Agreement
A-1758 dated November 22, 1944,
Org. file E-6235, Co. file E&F
~~111~~-5. *Done*
1-8

Article 40—No change.

Article 41 —Change Section 1 and 2 to conform
to Section 17 and 18, Article 32 of
the Southern Pacific agreement.
Done

Article 42—No change.

Article 43—No change.

Article 44 —Change to annual Section 1. Make
Section 1(b) Section 2. *Done*

Article 45—No change.

Article 46—No change.

Article 47, Section 1(c)—Adopt the understanding reached
March 9, 1951, Southern Pacific
file E&F 1-775, Org. file E-13900.
Done

Section 1(d)—Correct rate. *Done*

Article 48—No change.

Article 49—No change.

Article 50 —Correct rate [^] and apply settle-
ment covered by S.P. file E&F
Done
2-139, Org. file E-16610; [^] also
Case 8 of Mediation Case A-2602,
Org. file E-7535. *Done*

[^]
1(2-18)

Article 51—No change.

Article 52—No change.

Article 53—No change.

[fol. 283]

Article 54 —New section, S.P. file E&F 2-150,
1(157-19)13
[^] Org. file E. 16304.

Article 55 —Apply S.P. file E-3885, E&F 60-

1(157-19)14

152; ^ Items 5, 6 and 7 of Mediation Case A-2602, Org. file E-7535.

1(2-18)

Done

Article 56—No change.

Article 57

—Incorporate letter of agreement dated September 26, 1944, Co. file DTB-013-2, Org. file E-10455.

Article 58

—Adopt Southern Pacific agreement Article 33, *Done* Sections 5(a) and 5(b). Make Sections 1 and 2.

Article 59

—Adopt Section 6 of Article 33 of Southern Pacific agreement.
Done

Article 60—No change.

Article 61—No change.

Article 62—No change.

Article 63—No change.

Article 64 and
present 65

—Making Article 64 into Section 1 (see Org. file E-0521, Co. file E&F 2-44), and Article 65 into Section 2 of Article 64. 1-5 *Done*

Article 65

—Eliminate present rule, making it Section 2 of Article 64, and adopt S.P. settlement, Org. file E-16292, Co. file E&F 2-127. (1(157-19)8)
Done

Article 66—No change.

Article 67

—Incorporate Items 3 and 4 of Mediation Case A-2602 ^ Org. file 1(2-18)

E-7535. Also agree to apply S.P. settlements, (Co. file E&F 2-7, Org. file E-10386). *Done*

Appendix

—Vacation Agreement dated August 17, 1954, Org. file E-16158, Co. file E&F 145-10. *Done*

I ask that you agree to set a date and time when we can meet for the purpose of applying the above and rewrite the agreement covering engineers.

[fol. 284] My entire time will be taken during the month of February on Special Adjustment Board No. 18. I suggest Monday, March 7, 1955, at 9:00 AM for time to begin conference and conferences should continue daily until the agreement is signed and ready to be submitted to the printer.

Will you please advise your concurrence.

Yours truly,

/s/ J. P. COLYAR

[fol. 285]

EXHIBIT I TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

[Handwritten notations—S.D.A.E.—E&F 1-1415—PGV 9-27-61]

[Stamps—C.M.F.—Oct 2 1961—R.O.I.—Sep 25, 1961]

(Letterhead of Brotherhood of Locomotive Engineers,
General Committee of Adjustment, San Francisco 3, Calif.)

September 22, 1961

Org. File E-39-1(b)

SD&AE

Mr. K. K. Schomp (2)
Manager of Personnel
San Diego & Arizona Eastern Ry. Co.
San Francisco, Calif.

Attention—Mr. L. M. Fox, Jr.

I have been instructed by the General Committee of Adjustment to request that the settlement reached in disposing of Docket (2-13-34) Case No. 51, our File E-4069, Co. File E&F 60-120-1, on August 21, 1934, providing for the furnishing of earnings made by engineers to the Local Chairman (with copy to the General Chairman) of the BofLE, semi-monthly, be adopted on the San Diego & Arizona Eastern Railway, and to include the earnings of firemen also.

When this is done we shall have a uniform practice on all properties.

Yours truly,

/s/ J. P. COLYAR



[fol. 287] Declaration of Service by Mail (omitted in printing).

[fol. 304]

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Title omitted]

No. 2459 SD W

ORDER INDICATING INTENTION TO ENTERTAIN MOTION
—August 7, 1962

Counsel for petitioner having filed NOTICE OF APPLICATION FOR ORDER INDICATING INTENTION TO ENTERTAIN MOTION UNDER RULE (60 (b)) FEDERAL RULES OF CIVIL PROCEDURE, and having stated that said counsel will apply to this Court for its order indicating to the United States Court of Appeals for the Ninth Circuit its intention to entertain petitioner's motion for relief from final judgment entered herein on October 27, 1961, and the hearing on said Application having been set for August 10, 1962, and the parties having filed briefs, exhibits and written argument, and it appearing to the Court that no further argument is necessary, IT IS ORDERED.

Said Application is deemed to have been made upon the grounds stated in said Notice; the Application is submitted, and *it is ordered*:

The Application is granted: This Court hereby indicates its intention to entertain the Motion for Relief from Final Judgment, and this indication shall not be considered as a decision upon the merits of said Motion.

[File endorsement omitted]

It is further ordered: Upon receipt of the record herein from the Court of Appeals of the Ninth Circuit, the Clerk of this Court shall notice said Motion for Relief from Final Judgment for hearing; not later than three days prior to the date of said hearing, the parties shall file any [fol. 305] further affidavits, briefs, offers of proof, etc. which they may wish to present to the Court for decision upon said Motion and shall inform the Court whether they wish oral argument upon said motion, or whether they wish to submit said motion without argument.

In the event the parties wish to introduce oral evidence, an offer of proof shall first be filed as indicated in the preceding paragraph.

Dated August 7, 1962.

/s/ JACOB WEINBERGER
U. S. District Judge

[fol. 306]

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

F. J. GUNTHER, Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY,
a corporation, Defendant.

OPINION—March 29, 1963

On March 22, 1957, the petitioner herein filed a petition in the Central Division of the Court to enforce an award made by the National Railroad Adjustment Board on his claim against the defendant. The case was transferred to this Division, and is No. 2080-W in the Clerk's records. Subsequently, and on September 2, 1960, in this case he

[File endorsement omitted]

filed another petition to enforce a subsequent related award. The history of his claim and decisions of this Court in both cases are set out in opinions published in 161 F. Supp 295(1958) and 198 F. Supp 402 (1961).

On October 27, 1961 this Court granted a motion for summary judgment in favor of the defendant. Plaintiff filed an appeal, and during the pendency thereof and on June 5, 1962, petitioner noticed for hearing before this Court a motion for relief from the judgment and asked this Court to indicate to the Court of Appeals of the Ninth Circuit whether it would entertain said motion.

[fol. 307] On August 7, 1962, this Court filed its indication that it would entertain said motion, and ordered:

"Upon receipt of the record herein from the Court of Appeals of the Ninth Circuit, the Clerk of this Court shall notice said Motion for Relief from Final Judgment for hearing; not later than three days prior to the date of said hearing, the parties shall file any further affidavits, briefs, offers of proof, etc. which they may wish to present to the Court for decision upon said motion, and shall inform the Court whether they wish oral argument upon said motion or whether they wish to submit said motion without argument.

"In the event the parties wish to introduce oral evidence, an offer of proof shall first be filed as indicated in the preceding paragraph."

On September 21, 1962 this Court set the motion for hearing on October 4, 1962, and requested counsel to follow the procedure outlined in the order from which we have just quoted. Briefs and affidavits were filed. No offer to introduce oral testimony was made by either party. On October 4, 1962 a hearing on the motion for relief from the summary judgment was had, at which counsel for the parties made oral argument. A transcript of these proceedings is on file. The Court made certain queries of counsel and permission was requested to file further briefs; further briefs and affidavits were filed, and the motion submitted for decision.

• • • • •

[fol. 308] In case No. 2080-W as well as in this case, petitioner contended that the effect of each award was to order the defendant to reinstate him in its active service and give him back pay from the time he had been retired from service in 1954. The Board had ruled that a three-physician panel should examine Mr. Gunther and make the decision whether Mr. Gunther, at the time he was retired, was physically fit for active service.

In this case, the Court made findings of fact pursuant to which it granted defendant's motion for summary judgment. Two of such findings are of particular significance to the instant motion:

"10"

"At all times pertinent to this action said collective bargaining agreement hereinbefore referred to contained no provision limiting the right of defendant to remove and retire plaintiff from active service upon a finding by defendant's physicians that plaintiff was physically disqualified from active service."

"11"

"At all time pertinent to this action said collective bargaining agreement hereinbefore referred to contained no provision for a board of physicians to review the findings of defendant's physicians as to physical disqualification of its employees."

Three collective bargaining agreements on file as exhibits in this case are referred to by counsel as bearing on the issues for decision in the instant motion. They are:

(1) "The Green Covered Booklet" whose cover has the notation "Agreement San Diego & Arizona East-[fol. 309] ern Railway Company and Brotherhood of Locomotive Engineers Rules effective March 1, 1935, revised rates of pay effective October 1, 1937."

This booklet has been referred to in briefs and argument as the "agreement signed November 30, 1938" or

the "1938 Agreement" or the "1935 Agreement." We shall refer to it by the color of its cover.

(2) "The Orange Covered Booklet" whose cover has the notation "Agreement by and between the San Diego & Arizona Eastern Railway Company and its Locomotive Engineers represented by the Brotherhood of Locomotive Engineers Effective January 1, 1956."

We shall refer to this agreement as "The Orange Covered January 1, 1956 Agreement."

(3) "The Red Covered Booklet" whose cover has the notation "Agreement by and between *Southern Pacific Company (Pacific Lines)* (Excluding the former El Paso and Southwestern System) and its Locomotive Engineers represented by the General Committee of Adjustment of the Brotherhood of Locomotive Engineers, Effective August 1, 1958."

We shall refer to this agreement as "The Red Covered Booklet of August 1, 1958."

Throughout the progress of the prior case (2080-W) as well as this case, and until the filing of the instant motion, counsel for petitioner, as well as counsel for the defendant, stated and restated that the Green Covered Booklet contained the collective bargaining agreement which was in effect at the time Mr. Gunther was disqualified from service on defendant's line in 1954. While all parties admitted the Green Covered Booklet contain no mention of a board of physicians or three-doctor panel, [fol. 310] counsel for petitioner maintained that the following portions of the agreement (Green Covered Booklet) upon which he relied, would, if properly interpreted, limit the right of the employer to terminate employment by reason of physical unfitness:

"Article 35—Seniority

"Section 1

"Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as an engineer.'

"Section 3 (b)

"Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment.'

"Article 38—Reduction of force

"Section 1 (a)

"When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off may, if they so elect, displace any fireman their junior under the following conditions:

. . . .

"Second: That when the reductions are made they shall be in reverse order of seniority.' "

"Article 47—Investigations

"Section 1 (b)

"No engineer shall be suspended or discharged, except in serious cases, where a fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials.'

[fol. 311] *"Section 1 (e)*

"If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid rate as set forth in Appendix "B" for time lost on such account.' "

(Petitioner's brief filed February 10, 1958, p. 2.)

Petitioner now contends that on November 13, 1947, and prior to the printing of a new booklet containing the terms of said agreement as of January 1, 1956 (he refers to the Orange Covered Booklet) an addition was made to the agreement contained in the Green Covered Booklet, to-wit, a provision for adjustment of disputes between the carrier and employee as to the employee's physical fitness for performance of his duties as locomotive engineer by establishing a three-physician panel.

Petitioner relies upon the affidavit of J. P. Colyar filed in support of his motion, his own affidavit, and numerous exhibits attached to the affidavits, and upon the records and files of this case and the previous case. (2080-W).

Briefly, Mr. Colyar's affidavit states that he is at the present time, and has been since August 22, 1947, the Chairman of the General Committee of Adjustment, Brotherhood of Locomotive Engineers, for the Southern Pacific Company (Pacific Lines) and four other railroads, including the defendant's; that in his capacity, it has been his responsibility to negotiate terms and conditions of employment of locomotive engineers in the employ of said carriers and to adjust claims and grievances arising under existing collective bargaining agreements between the carriers and the Union. Mr. Colyar further recites that since 1935 the Brotherhood of Locomotive Engineers has been designated by the National Railroad Mediation Board [fol. 312] as a representative of locomotive engineers employed on defendant's railroad. He then states that the Green Covered Booklet, when it was printed, contained all the terms of the agreement between the Union and the SD&AE railroad, but that prior to the printing of a new booklet containing the terms of said agreement as of January 1, 1956, there were many modifications and additions to the agreement, and that one such addition was the provision for adjustment of disputes between the carrier and employee as to the employee's physical fitness for performance of his duties as locomotive engineer by the establishing of a three-doctor panel to make such determination.

He then states that this addition resulted from certain correspondence, copies of which he has attached to his affidavit as exhibits. He refers to Exhibits A, B, C, D, E, F, G, H, I and J, correspondence dated within the period beginning June 3, 1944 and January 4, 1945 between a predecessor General Chairman for the Brotherhood of Locomotive Engineers, and the Vice-President and General Manager of defendant railroad, Mr. Gernreich, as establishing an agreement between the organizations represented by the correspondents. He states that this agreement was that provisions of the agreement between the Union and defendant railroad which were worded identically to provisions of the agreement between the Union and the Southern Pacific (Pacific) lines, would receive the same interpretation. Mr. Colyar then refers to Exhibits K and L as establishing an interpretation to Article 12, Section 1 of the Southern Pacific agreement with the Union; the interpretation provided for the adjustment of disputes between carrier and employee as to the employee's physical fitness for performance of his duties as locomotive engineer by the appointment of a three-physician panel to [fol. 313] make such determination; he further states that because of such interpretation, and because Article 9, Section 1 (c) of the SD&AE agreement was identically worded, the said SD&AE agreement contained such a provision for such a three-physician panel, on and after November 13, 1947. That such provision remained in said SD&AE agreement in the form shown in Exhibits K and L until December 1, 1959 when it was changed through his request (Exhibit M) to the form shown on Exhibit O, and made an addition of Article 35 of said agreement.

Both counsel agree that a motion of this sort should not be granted unless

“(a) The evidence which he (movant) brings to the attention of the Court for the first time is not merely cumulative but, if considered by the Court, would probably lead to determination of defendant's motion for summary judgment in petitioner's favor.

"(b) The evidence was not in his possession at the time of the hearing on the motion for summary judgment and due diligence on his part would not have altered this situation."

(Quoting from petitioner's brief, filed November 19, 1962, citing *Phillipine National Bank v. Kennedy*, (App. D.C. 1961) 295 F. 2d 544; *Greenspahn v. Joseph E. Seagram & Sons*, CCA 2, 1951) 186 F. 2d 616; *Baruch v. Beech Aircraft Corp.* (CCA 10, 1949) 172 F. 2d 145.)

Approximately 7 years have elapsed between the disqualification of Mr. Gunther from service of the defendant and the rendition of the judgment of this Court from which relief is here sought. Prior to such judgment, petitioner's present counsel represented him in the U. S. District Court in proceedings to enforce awards of the Ad-[fol. 314] justment Board over a period of nearly 4 years. There is correspondence among the exhibits filed with reference to this motion showing that as early as 1958 Mr. Colyar, on behalf of Mr. Gunther, had written defendant with regard to the enforcement of the award and restoring Mr. Gunther to service, and that as early as March 29, 1960, Mr. Colyar was on record, in behalf of the Brotherhood of Locomotive Engineers as Mr. Gunther's representative, in handling petitioner's case.

We find nothing in the record to justify petitioner's failure to discover and present to the Court prior to the rendition of judgment, the evidence he now proffers.

Recourse to statements in affidavits filed by the defendant is not necessary for us to see that petitioner has not produced and would not be able to produce at a trial, any evidence which could lead to a determination in his favor.

A most adequate analysis of the newly discovered evidence and its effect is presented in the brief of defendant filed December 26, 1962. We are in accord with the observations made by defendant's counsel in such brief and expressly note with approval the language beginning with line 17, page 8, to the end of said brief.

In addition, we make these observations as to matters which have occurred to us after a careful study of the

correspondence in Mr. Colyar's affidavit, other correspondence of Mr. Colyar on file herein and the three booklets containing collective bargaining agreements.

We find nothing in the affidavits filed by petitioner or the exhibits attached to such affidavit, nor in any material presented by petitioner, to show that a three-physician panel to resolve disputes regarding an engineer's physical disqualification for active service was ever applicable, prior to 1959, to engineers on the SD&AE railroad. (The [fol. 315] agreement *was* amended in 1959 to include such a provision). A detailed examination of the reprinted agreement (Orange Cover, January 1, 1956) shows no reference whatever to such a panel.

The Court queried counsel for petitioner at the hearing as to why the provision regarding a three-doctor panel was not included in the reprinted agreement (Orange Cover) of January 1, 1956 if the same had been made applicable to engineers on the SD&AE. In his brief filed after the hearing counsel for petitioner suggested that "A reasonable inference to be drawn for its omission from the orange-covered booklet as of January 1, 1956, is that it was inadvertently omitted by those charged with the responsibility of seeing that all existing contractual provisions were incorporated there."

Attached to the affidavit of K. K. Schomp filed July 23, 1962 are a number of photostatic copies of letters and notices from Mr. Colyar to the various railroads, including the SD&AE, signed by Mr. Colyar as General Chairman of the General Committee of Adjustment of the Brotherhood of Locomotive Engineers. Under date of January 26, 1955 (preceding the reprinting of the agreement between the Union and the SD&AE in January of 1956) we find a copy of a letter from Mr. Colyar to Mr. P. D. Robinson, Vice President and General Manager, San Diego & Eastern Railway Company. Mr. Colyar states:

"Pursuant to and in accordance with Article 68 of the agreement covering engineers, dated November 30, 1938, it is our desire to reprint the agreement.

"In order to bring it up to date, the settlements and agreements set forth hereafter should be applied to present rules or corrections made, whichever is applicable."

Then follows a list enumerating each article of the Green Covered Booklet (1 to 67 and appendix) with a typewritten notation after each number of an article, such as "Apply Southern Pacific Settlements covered by files . . .", or "Correct guarantee", or "Extend rates", or "No change", or "Eliminate", and so on. Referring to Exhibit H of Mr. Colyar's affidavit upon which petitioner relies, we note that the additions set forth in such letter as those to which the railroad is agreeable, to-wit, additions, etc. to Articles 7, 9 and 15, are included word for word in said numbered articles of the reprinted agreement (Orange Cover) of January 1, 1956. Opposite the words "Article 35" in Mr. Colyar's list of changes for the 1956 reprint are the words "No change", and said reprinted agreement (Orange Cover) discloses no change in said article.

Further, we observe that in Exhibit "H" the SD&AE official, Mr. Gernreich, after listing the additions to which he is agreeable, including the statement that interpretations of the SP agreement may be applied to similarly worded rules of the SD&AE agreement, says: "Upon receipt of your concurrence, necessary instructions will be issued". The reply letter from Mr. Peterson for the Union thanks Mr. Gernreich for granting the additions and changes to Articles 7, 9 and 15, but mentions no "concurrence" with reference to similar interpretations.

We note also that Mr. Colyar's connection with the Union as Chairman, General Committee of Adjustment Brotherhood of Locomotive Engineers, did not begin until several years after the correspondence regarding similar interpretations was exchanged.

We might also point out that had the Union forwarded [fol. 317] its concurrence as to similar interpretations; had Exhibits K and L (referring to the case of an engineer on a road other than the SD&AE) been susceptible of ap-

plication under any similarity of interpretation agreement, there was not similarity between the cases of engineer Caloway and engineer petitioner; had there been similarity between the cases, we must point out that nothing was stated in Exhibit K or L to the effect that the decision of a majority of a three-physician board was controlling on either party; had there been such a statement, the panel of three-physicians, under the wording of Exhibits K and L was obligated to determine whether the engineer had the physical ability to conform to certain standards prescribed by the company. (It was emphasized in each of Exhibits K and L that the railroad had the responsibility of prescribing physical standards).

Finally, if every other contention petitioner has made could be resolved in his favor, there would still be present these pertinent facts: that the Adjustment Board could not have been proceeding under the provisions of Exhibits K and L, because there is no direction in the Board's order that the third physician on the panel should be a specialist in the disease from which petitioner was suffering; there is no order that the three-physician panel should decide the engineer's ability to conform to *company prescribed physical standards*; there is no showing as to what standards the company prescribed, and there is no reference to any company prescribed standards in the reports of the three-physician panel to the Railroad Adjustment Board.

1. Petitioner argues that the affidavits and exhibits supporting the instant motion are sufficient at least to raise a factual issue which must cause us to set aside the summary judgment and try the case on its merits.

[Vol. 318] As we have heretofore indicated, both parties were given the fullest opportunity to present what evidence they had prior to the hearing on this motion. Inquiry was made if either party desired to present oral testimony in support of or in opposition to the motion. None was offered. We assume that if the judgment were set aside, petitioner's case would rest, as it does now, on Mr. Colyar's and Mr. Gunther's affidavits and the docu-

ments and exhibits filed in this case and the preceding one. It appears to us that were we to set aside the judgment, petitioner would be in much the same position as he was when he opposed the motion for summary judgment: pressing for an "interpretation" by the Court, of agreements, documents and correspondence which are all in the record before the Court. No factual issue was raised prior to the decision on the motion for summary judgment, and none has been raised by the motion for relief from such summary judgment.

The motion for relief from judgment should be denied.

Dated this 29th day of March, 1963.

Jacob Weinberger, United States District Judge.

[fol. 319]

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

F. J. GUNTHER, Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY,
a corporation, Defendant.

ORDER DENYING MOTION FOR RELIEF FROM FINAL JUDGMENT

—April 10, 1963

On June 4, 1962, petitioner filed a Notice of Motion for Relief from the judgment of this Court entered October 27, 1961, in the above-styled case. The notice set forth the grounds for the motion as "1. Mistake, inadvertence,

[File endorsement omitted]

surprise or excusable neglect; 2. Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; and 3. For other reasons justifying relief from the operation of said judgment." Affidavits of Messrs. Gunther, Colyar and Decker were filed in support of the motion. A notice of motion for an order of this Court indicating an intention to entertain the motion for relief was filed at the same time, which, if granted, would permit petitioner to seek an order of remand from the Court of Appeals for the Ninth Circuit where the action was pending. On August 7, 1962, this Court issued its order indicating intention to entertain [fol. 320] the motion. Thereafter the matter was argued before this Court and fully briefed by the parties and submitted. On March 29, 1963, this Court issued its opinion analyzing all of the evidence proffered by petitioner, the affidavits, documents, and the legal arguments involved in this motion. The record demonstrates that there is no valid support for the contentions of mistake, inadvertence, surprise or excusable neglect; that the evidence offered was neither newly discovered nor of such a nature that it could not have been discovered by due diligence in time to move for a new trial; that even if the judgment were vacated in order to receive the evidence offered in the record it would not justify a different conclusion or judgment, and that there have been presented to this Court no reasons justifying relief from the operation of the said judgment.

Accordingly, It Is Ordered that the motion for relief from final judgment be, and the same hereby is, denied.

Dated this 10th day of April, 1963.

Jacob Weinberger, United States District Judge.

[fol. 321] Declaration of Service by Mail (omitted in printing).

[fol. 322]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
No. 2459 SD-W

F. J. GUNTHER, Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY,
a corporation, Defendant.

NOTICE OF APPEAL—Filed April 24, 1963

Notice Is Hereby Given that F. J. Gunther, petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Denying Motion For Relief From Final Judgment entered in the docket on April 10, 1963.

Dated: April 17, 1963.

Hildebrand, Bills & McLeod, Charles W. Decker,
By Charles W. Decker, Attorneys for Petitioner.

[File endorsement omitted]

[fol. 323] Proof of Service by Mail (omitted in printing).

[fol. 330]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil Docket

2459-SD-W

Jury

Jury demand date: 4-24-61

F. J. GUNTHER, Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY,
a corporation, Respondent.

[fol. 331] 2459-SD-W

DOCKET ENTRIES

DATE

PROCEEDINGS

- 9/26/60 Fld petn to enforce award & ord of Nat'l RR adjustment Board. Sums mailed to atty in San Francisco. Md JS-5.
- 11/15/60 Fld sums svd as to each deflt.
- 11/28/60 Fld not of mot & mot for summy judgt noticed for 12/14/60 2 PM. Fld memo of pts & auths. Fld affd K. K. Schomp. Lodged judgt.
- 12/ 2/60 Fld ord for con't from 12/14/60 to 12/19/60, 10am for hrg mot for summy Judgmt (W). Fld supplemental affd of K.K. Schomp.
- 12/12/60 Fld petnr's memo in oppos to mot for summy judgmt.

DATE	PROCEEDINGS
12/19/60	At req of counsel, ord submitted w/o argument (W).
3/27/61	Ent ord deft mot for summary jdgmt as to grounds labelled 1 & 11 is denied. Copies sent to counsel. (Fld courts memo opinion (W)
4/10/61	Fld ord allowing deft up to & including 4/24/61 in which to ans or move fur in response to petn on file (W)
4/24/61	Fld ans of deft. Fld demand for Jury Trial.
5/ 9/61	Fld assoc of attys & ord thereon (W).
5/16/61	Fld not of mot & mot for summy jdgmt, notice for 5/29/61, 2 P.M. Fld affid of K. K. Schomp. Fld memo of pts & auths. Fld proposed findgs of fact and con of law. LODGED proposed judgmt.
5/29/61	Fld petners memo in oppos to mot for smmy jdgmt. Fld petners affid in oppos to mot for summy jdgmt. Hrg mot for summy jdgmt & settg for P/T & settg for Trial. Both sides argue Ord cont to 7/3/61, 10 A.M. for fur procs or submssn (W).
6/26/61	Ent ord fur proceedngs or submission in the above-entitled matter is cont to 7/21/61, 10 A.M. (W). Copies to counsel.
7/21/61	Ord matter submitted (W)
9/27/61	Filed opinion (W). Ent min ord that within 10 days deft will srv findgs, con of law and jdgmt in conformity with opinion; petnr may have 5 days after srv file objects as to form only (W)
10/27/61	Fld order granting defts motion for summary judgment, that award of First Division, National

DATE

PROCEEDINGS

- Adjustment Board dated 10/8/58 is set aside, and awarding defts costs. (W) (Ent 10/27/61 and not attys) JS-6
- 10/30/61 LODGED proposed findings of fact, conclusions of law & jdgmt.
- 11/ 6/61 Fld not of ent of jdgmt.
- 11/27/61 LODGED & Fld Not of Appeal
LODGED & Fld stip & waiver re bond for costs on appeal & ord thereon (W)
- 1/ 4/62 Fld ord extending time for flg record on appeal to 2/25/62 & Docketing Appeal (W)
- 2/ 1/62 Fld designation of portions of the record to be contained in record on appeal
Fld statements of pts on which appellant intends to rely on appeal.
- 2/ 8/62 Fld appellees' designtn of portns of record to be contained in the record on appeal
- 2/12/62 Issd & fwd to CA transept rec on appeal (orig docs)
- 5/31/62 Fld rep'trs transcript of proceedings
- 6/ 5/62 Fld petnrs not of mot for relief from final jdmt. noted for 6/25/62 2 P.M.
Fld affd of Charles W. Decker, F.J. Gunther, J. P. Colyar.
- 6/ 7/62 Fld not of application for ord indicating intention to entertain motion under Rule 609(b) noted for 7/9/62, 2 P.M.
- 6/18/62 Fld stip with mot thereon for contg hrg upon mot for relief from operation of jdgmt pursuant to rule 60(b). Fed rules of Civil Procedure, cont to 7/9/62, 2 P.M. (W)
- 7/ 2/62 Ent minute ord herg mot for relief from operation of jgmt is cont to 7/13/62, 10 A.M. (W)

DATE

PROCEEDINGS

- 7/ 9/62 Fld affid of C. M. Buckley; K. K. Schomp, C. A. Ball, L. M. Fox, Jr; W. A. Gregory
- 7/13/62 Ord hrg on applic for ord indicating intent to entertain mot under Rule 60 cont to 7/27/62, 10 A.M. (W) Ent min ord that mots of pltf heretofore set for 7/13/62 cont to 7/27/62, 10 A.M. Counsel directed to file any additional af of memos by 7/23/62 (W)
- [fol. 332]
- 7/23/62 Fld supp affid of K. K. Schomp.
- 7/27/62 Hrg applic for ord indicating intention to entertain mot under Rule 60(b) cont to 8/10/62 10 AM at req of counsel (W)
- 8/ 7/62 Fld ord indicating intention to entertain motion: ord applic granted (W).
- 8/24/62 Fld c.c. ord for remand & rec'd transcript of record from the C.A.
- 9/21/62 Ord pltf mot for relief from final jdgmt is set for hrg on 10/4/62, 10 AM and counsel will follow proceed outlined in Cts ord of 8/7/62 (W)
- 10/ 4/62 Hrg mot for relief frm final jdgmt; fld supplemental affid of J. P. Colyar; ord counsel for pltf given 20 days to summarize argument and deft given 20 days thereafter to reply and pltf given 10 days to respond to defts argument; ord cont to 12/10/62, 2 P.M. for fur procdgs or submission (W)
- 11/19/62 Fld petnrs memo in suppt of mot pursu to Rule 60(b).
- 12/ 7/62 Fld stip counsel have to 12/21/62 to file ans and petn have 5 days of recpt by him to file reply brief; hrg with respect to fur procdgs or sub-

DATE

PROCEEDINGS

mission be cont to such date convenient to Crt.
Fld ord cont fur procdgs or submsn of matter
to 1/4/63, 2 P.M. (W)

- 12/26/62 Fld defts memo in oppos to mot pursu to Rule 60(b)
- 12/26/62 Ent min ord that pltf hav to 1/4/63 to file reply brief; ord cont fur procdgs or submission frm 1/4/63 to 1/11/63, 2 P.M., couns need not be present unless notifi (W)
- 1/ 3/63 Fld petnrs reply memo on submission of mot pursu to Rule 60(b).
- 1/11/63 Ord submitted (W)
- 3/29/63 Fld Opinion.
Ent min ord that counsel for deft w/i 10 days sv and submit ord denying petnrs mot for relief in accord with opinion fld this day (W)
- 4/10/63 Fld ord denying motion for relief from final judgment. (W) (ENT. 4/10/63)
- 4/24/63 Fld stip and waiver of Bond for costs on appeal and ord thereon (W)
Fld notice of Appeal.
- 5/ 2/63 Fld designation of the portions of record to be contained in the record on appeal.
- 5/ 8/63 Fld appellee's designation of additional portions of record to be contained in the record on appeal.
- 6/ 4/63 Issd & fwd to CA, transc rec on appeal (orig docs)
- 10/26/64 Fld cc judgment CA affirming judgment of this court. (Ent 10/26/64)
Ord jdgmt of Court of Appeals filed in this court (W)

[fol. 336]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,724

F. J. GUNTHER, Appellant,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY,
a coporation, Appellee.

On Appeal from the United States District Court for the
Southern District of California, Southern Division.

OPINION—September 4, 1964

Before: Pope, Hamley and Merrill, Circuit Judges.

MERRILL, Circuit Judge:

Appellant initiated this proceeding on November 28, 1960, by filing in the District Court for the Southern District of California a petition under 45 U.S.C. 153(p),¹ seeking enforcement of an award and order of the First Division of the National Railroad Adjustment Board. That award and order directed that appellant be reinstated by the Railroad

¹ "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner . . . may file in the District Court . . . a petition setting forth briefly the causes for which he claims relief, and the order of the Division of the Adjustment Board in the premises. Such suit in the District Court shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, . . . The District Courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (45 U.S.C. 153(p) (1958).)

(Feb. 20) to active employment, with pay for lost time. The Railroad successfully contended before the District Court that the award and order was made in excess of the jurisdiction of the Adjustment Board, and was therefore not subject to a judicial order of enforcement. Summary judgment was rendered in favor of the Railroad. Appellant subsequently moved, under F.R.C.P. Rule 60(b), to be relieved of judgment on the ground of newly discovered evidence. This motion was denied by the court. Appeals from both the judgment and subsequent order were taken and have been consolidated.

On December 30, 1954, shortly after appellant's seventy-first birthday, the Railroad removed him from active service. He had been employed by the Railroad since December, 1916, and his employment since December, 1923, had been as locomotive engineer.

The record establishes without dispute² that appellant's removal was under the following circumstances:

"Locomotive engineers employed by the San Diego & Arizona Eastern Railway Company are and have always been required to take and pass periodic physical examinations and reexaminations to determine their fitness to remain in service. In the year 1954 these requirements provided, and they still provide, that employees of age seventy and over must take and pass such a physical examination every three months. In accordance with the foregoing rule, Mr. Gunther reported for physical examination on November 24, 1953, and for additional examinations (reexaminations) in each successive three-month period to and including December 15, 1954. On the latter date Mr. Gunther reported for and took his physical examination; and on the basis of the findings during this examination the examining physicians determined that he was no longer physically qualified to remain in service as a locomotive engineer. These findings were reviewed at the Southern Pacific Hospital in San Francisco by the Chief Surgeon, who concurred in the findings and opinion that Mr. Gun-

² By affidavit of appellee's personnel manager.

that's heart was in such condition that he would be likely to suffer an acute coronary episode. Based upon [Vol. 888] this conclusion, Mr. Gunther was physically disqualified, as aforesaid, on December 30, 1954."

Following removal, appellant submitted to an examination by a physician of his own choice, and on the basis of that doctor's favorable report requested of the Railroad that a three-doctor board be appointed to reexamine his physical qualifications for return to service. When this request was denied appellant filed with the Railroad Adjustment Board a claim for reinstatement and back pay. The claim was presented on appellant's behalf by the Brotherhood of Locomotive Firemen and Enginemen, of which organization appellant was a member and officer. The designated collective bargaining representative of the Railroad's employees, however, was the Brotherhood of Locomotive Engineers and it was the contract reached between that organization and the Railroad which constituted the applicable collective bargaining agreement.

Before the Adjustment Board appellant's claim was opposed by the Railroad on the ground that there was no rule providing for the appointment of a neutral medical board and that the Railroad's judgment of appellant's fitness, based upon the decision of its Chief Surgeon, was not subject to review.

The Board nevertheless ordered a neutral board to be established. Its order of October 2, 1956, provided:

"It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employees to remain in service. It is true also that the employee has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service. If carrier through its medical staff has removed an employe from service in good faith, on the basis of a fair standard of fitness, applied to his physi-

cal condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

Since determination of the facts necessary to enable the Division to make proper award on such issue re: [61.889] requires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by carrier and one by the employee and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians.

While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians. If the decision of the majority of such board shall support the decision of carrier's chief surgeon, the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians."

Appellant was duly examined by the neutral board and the Adjustment Board subsequently found "that the majority of said board properly examined claimant and that their findings and decision therefrom did not support the decision of carrier's chief surgeon but that they found and decided that claimant had no physical defects which would prevent him from carrying on his usual occupation as engineer." The claim of appellant was sustained with pay for all time lost from October 15, 1955. It is for enforcement of this award and order that this proceeding was instituted.

The function of the Railroad Adjustment Board is set forth as follows in 48 Stat. 1189 (1934), 45 U.S.C. 153(i) (1958):

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner [fol. 340] up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The First Division of the Board, by § 153(g), is given authority over disputes involving engineers.

The issue here is whether any dispute growing out of a grievance or question of contract interpretation is presented by appellant's removal from active service upon the ground of physical disqualification. We agree with the District Court that no such dispute is presented.

It is clear from the record that the Railroad has always reserved to itself the right and responsibility of determining the qualifications of its employees, including, importantly, the physical fitness of its locomotive engineers. It would seem to us to be a most elementary proposition that in the public interest the responsibility for such determinations must be clearly fixed, and that in the absence of contrary provisions in the applicable collective bargaining agreement such responsibility must rest with the Railroad.³

³ While it may well be that an arbitrary exercise of its rights and responsibilities by the Railroad could form the basis of a grievance, the Board's own order, as we have heretofore quoted it, states that reinstatement should be limited to such cases. If, states the Board, there is a lack of good faith in the removal or lack of a

[fol. 341] There was no contrary provision in the contract between the Railroad and the Brotherhood of Locomotive Engineers as of the date of appellant's removal.

Appellant refers us to the contract's general provisions respecting seniority rights and right to continue active employment in the absence of good cause for discontinuance thereof.* It is clear from a reading of these provisions that

fair standard of fitness or adequate determination, the claimant has been wrongfully removed. Otherwise, states the Board, there is no right to reinstatement.

Nowhere in the record do we find any suggestion of a lack of good faith on the part of the Railroad, or that absence of the likelihood that an acute coronary episode might be suffered is not a fair standard of fitness for a locomotive engineer; or that the determination of the Railroad surgeons was not "adequate" (which we would suppose to relate to the qualifications of the medical examiners and the sufficiency of their examination). The record simply shows that a "majority" of the neutral board disagreed.

* "Article 35—Seniority

Section 1

Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as an engineer.

Section 3 (b)

Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment." (Gunther affidavit filed May 29, 1961. R. 100.)

"Article 47—Investigations

Section 1 (b)

No engineer shall be suspended or discharged, except in serious cases, where a fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials.

Section 1 (e)

If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid rate as set forth in Appendix 'B' for time lost on such account.

Article 38—Reduction of force

Section 1 (a)

When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off may, if

they deal with discharge for cause, which is not to be confused with physical disqualification.

In our judgment, the Board exceeded its jurisdiction. It dealt with a dispute entirely foreign to the collective bargaining contract or to any question of interpretation arising under it.

Appellant contends that the determination of this dispute by the Adjustment Board and its decision to entertain the dispute should be accepted by this Court under the arbitration-encouraging rules laid down in *United Steel Workers* [fol. 342] *v. Warrior & Gulf. Nav. Co.* (1960) 363 U.S. 574; *United Steel Workers v. American Mfg. Co.* (1960) 363 U.S. 564, and decisions of like import.

We do not find that line of authority in point. Those cases arose under § 301 of the Labor Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958), and dealt with arbitration provisions of collective bargaining agreements. In those cases the parties were required to resolve their disputes as to the contract's meaning by a method upon which they had themselves agreed. Here the parties have not agreed to arbitration. Resolution of their disputes by the Adjustment Board is imposed by statute and the basic issue is not as to the meaning of what the parties have said but the meaning of what Congress has stated. Congress has (see footnote 1) provided for judicial review of the Board's decision and that the Board's findings and order shall be "prima facie evidence of the fact." The reviewing court is authorized to enter such judgment "as may be appropriate to enforce or set aside the order * * *." It would seem apparent that Congress intended that the courts should have full power to review the question whether a dispute as defined by Congress (rather than by the parties themselves) exists.

they so elect, displace any fireman their junior under the following conditions:

Second: That when reductions are made they shall be in reverse order of seniority." (Gunther affidavit filed May 29, 1961. R. 100.)

Appellant asserts that in any event summary judgment was a premature and precipitate disposition of the case upon the merits, and that issues of fact were presented or suggested by the record. In this connection it contends that the record on motion for summary judgment did not show that the collective bargaining agreement before the court was the complete agreement, but on the contrary showed that it had been amended in some respects, thus suggesting that it might have been amended in others as well; that with respect to the extent of appellant's rights the agreement was vague and uncertain, and that these uncertainties remained to be resolved.

We agree with the District Court that however vague and uncertain the agreement before it might have been as to appellant's rights in other respects, it is clear that it conferred on him no right to challenge the Railroad's good-faith judgment as to his physical fitness. If the agreement between the parties in any material respects had been amended, appellant had ample opportunity to present this fact on motion for summary judgment. The motion granted [fol. 343] was the second motion made by the Railroad. The first had been denied in order to give appellant the opportunity to present evidence respecting the contract. *Gunther v. San Diego & A. E. Ry.* (S.D.Cal. 1961) 192 F. Supp. 882. The Court explicitly pointed out in this respect:

"If counsel for the petitioner denies that Exhibit A of said affidavit as the same appears in the Clerk's file, is not the contract in controversy, then there is, of course, need for clarification." 192 F.Supp at 887.

Appellant was also invited to show, by affidavit, what ambiguities in the contract he had in mind, and what parol evidence he deemed important in resolving them.

It was only when appellant failed to respond to the Court's invitation that, on a renewed motion, summary judgment was ordered. Under these circumstances this was not error.

Judgment is affirmed.

On appeal from the order denying his § 60(b) motion, appellant contends that the Court improperly rejected his newly discovered evidence.

The record before the District Court showed that while, at the time of appellant's removal from active service, there was no agreement that physical fitness was to be decided by a three-doctor panel, such an agreement was reached in 1959. Appellant by his newly discovered evidence sought to prove by correspondence between the Southern Pacific Company (appellee's parent) and the Brotherhood of Locomotive Engineers that in fact such an agreement had been reached in 1944, ten years before his removal.

The Court ruled "that the evidence offered was neither newly discovered nor of such a nature that it could not have been discovered by due diligence in time to move for a new trial."

Appellant attacks this determination. He explains his delay in learning of this evidence by the fact that he was a member not of the Brotherhood of Locomotive Engineers but of a rival union and that the correspondence establishing the agreement was not available to him.

[fol. 344] This may explain a lack of knowledge but it does not justify a failure to search or to inquire. More than a year passed between the denial of the Railroad's first motion for summary judgment (and the Court's invitation to appellant to present evidence of the agreement) and the filing of appellant's 60(b) motion. Denial of the motion under these circumstances was neither error nor abuse of discretion.

On its order denying 60(b) relief, the Court is affirmed.

[fol. 345]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 18,724

F. J. GUNTHER, Appellant,
vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY,
a corporation, Appellee.

JUDGMENT—Filed and Entered September 4, 1964

Appeal from the United States District Court for the
Southern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the
Record from the United States District Court for the
Southern District of California, Southern Division, and
was duly submitted.

On Consideration Whereof, It is now here ordered and
adjudged by this Court, that the judgment of the said
District Court in this Cause be, and hereby is affirmed.

[fol. 346]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 18724

F. J. GUNTHER, Appellant,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY,
a corporation, Appellee.

CERTIFICATE OF CLERK, UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER
RULE 21 OF THE REVISED RULES OF THE SUPREME COURT
OF THE UNITED STATES

I, Frank H. Schmid, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing transcript of record containing three hundred and forty-six (346) pages, numbered from and including 1 to and including 346, to be a full, true and correct copy of the entire record, including original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to the request of counsel for the appellant Gunther, and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of November, 1964.

William E. Wilson, Frank H. Schmid, Clerk.

[fol. 347]

SUPREME COURT OF THE UNITED STATES

No. 733, October Term, 1964

F. J. GUNTHER, Petitioner,

v.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY.

ORDER ALLOWING CERTIORARI—March 1, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED

DEC 2 1964

JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1964

No. [REDACTED] 27

F. J. GUNTHER,

Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN

RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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In the Supreme Court

**OF THE
United States**

OCTOBER TERM, 1964

No.

F. J. GUNTHER,

Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN

RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals

for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause on September 4, 1964.

CITATION TO OPINION BELOW

The opinion and judgment of the Court of Appeals, printed in Appendix B hereto, is reported in 336 F.2d 543.

The opinion of the District Court denying respondent's first motion for summary judgment is reported in 192 F.Supp. 882 (S.D. Cal. 1961), and the opinion granting respondent's second motion for summary judgment is reported in 198 F.Supp. 402 (S.D. Cal. 1961).

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., section 1254 (1).

QUESTION PRESENTED

In this action under 45 U.S.C., section 153 (p), to enforce an Award and Order of the National Railroad Adjustment Board, the District Court, on motion of respondent for summary judgment, determined that the applicable collective bargaining agreement did not limit respondent's "residual right" (*Gunther v. San Diego & Arizona Eastern Ry. Co.* (S.D. Cal. 1961), 198 F.Supp. 402, 414), to determine the physical fitness of its employees. It therefore concluded that the Board had exceeded its jurisdiction when it established a three-physician panel to determine petitioner's physical fitness to continue in active service as a locomotive engineer and in ordering petitioner reinstated to such service, with back pay, on the basis of the findings of said panel. Since the Board's Award and Order were *ultra vires*, the District Court

deemed itself without jurisdiction to hear the merits of the petition.

The question presented is whether this summary rejection of petitioner's suit, based on said Award and Order, is consistent with the presumptive validity conferred upon such awards by Section 3 (p) of the Railway Labor Act (45 U.S.C., section 153 (p)), the comprehensive statutory scheme for amicable adjustment of disputes between carriers by rail and their employees, and the decisions of this Court which require railroad workers, in seeking implementation of their contractual rights to continued employment, to abstain from concerted economic action and to place their entire reliance on the Board and, if its award is favorable, the federal judiciary.

STATUTES INVOLVED

The statutory provisions involved are Sections 1-6 of the Railway Labor Act, 45 U.S.C., Sections 151-156. Pertinent provisions of Section 3 (45 U.S.C., section 153) are printed in Appendix A hereto.

STATEMENT OF THE CASE

Petitioner is aware of the importance of brevity of this statement. However, this case has a lengthy history. It was referred to as an "endless proceeding" by the Court of Appeals for the Fifth Circuit in

Hodges v. Atlantic Coast R. Co. (5th Cir. 1962), 310 F.2d 438, 444. The saga of petitioner's long struggle to vindicate his right to continue in active service, and to back pay, is published in three District Court opinions (*Gunther v. San Diego & Arizona Eastern Ry. Co.* (S.D. Cal. 1958), 161 F.Supp. 295; *Gunther v. San Diego & Arizona Eastern Ry. Co.* (S.D. Cal. 1961), 192 F.Supp. 882; *Gunther v. San Diego & Arizona Eastern Ry. Co.* (S.D. Cal. 1961), 198 F. Supp. 402), and one opinion of the Court of Appeals (*Gunther v. San Diego & Arizona Eastern Ry. Co.* (9th Cir. 1964), 336 F.2d 543).

Demonstration of the error below (failure to recognize the presence of factual issues for trial) and of the inconsistency between the decision of the Court of Appeals and that of the Third Circuit in *Kirby v. Pennsylvania R. Co.* (1951), 188 F.2d 793, and that of the Fifth Circuit in *Hodges, supra*, and of the violence which the decision below does to the legislative scheme for orderly adjustment of employer-employee disputes in the rail industry, as elaborated by decisions of this Court, requires petitioner to present said history in some detail. Petitioner will endeavor to be as brief as adherence to these considerations will permit.

On December 30, 1954, respondent, a wholly owned subsidiary of the Southern Pacific Company and a railroad carrier operating a freight service over track running between San Diego, California, and El Centro, California, removed petitioner from active service on the basis of a report by its chief surgeon that his

heart was in such condition that he would be likely to suffer an acute coronary episode. (R 70-71)¹

Petitioner had been employed by respondent since 1916—as a fireman until 1923 and thereafter as a locomotive engineer. (R 2-3, 56-57) For many years during this long service, and continuing to the date of such removal, petitioner was General Chairman for the Brotherhood of Locomotive Firemen and Engineers.² (R 99) The designated collective bargaining agent for respondent's engineer employees during this period, however, was a rival organization, the Brotherhood of Locomotive Engineers.³ Thus, despite petitioner's membership and official status with the BofLF&E, the terms of his employment were to be found in the agreement between respondent and BofLE.⁴

For many years prior to December 30, 1954, the officials of the BofLE and respondent carried on continuing negotiations with respect to demanded changes in the terms of the agreement and with respect to disputes arising out of claims of individual employees, or groups of employees, based upon alleged violations of contractual rights, i.e., grievances. Negotiations upon proposed changes were initiated by the notice required by Section 6 of the Railway Labor Act. (45 U.S.C., section 156) Grievances were handled by the

¹The record on appeal is a Clerk's Transcript of the file of the District Court. It has not been printed. It will be referred to herein by the designation "R" with appropriate page number.

²Hereinafter referred to as "BofFL&E."

³Hereinafter referred to as "BofLE."

⁴Hereinafter referred to as "SD&AE-BofLE agreement."

conference procedure provided by Section 2, "General Duties, Second," of said Act. (45 U.S.C., section 152 (Second))

Both types of negotiations could and did culminate in the creation of new contractual rights and duties. Such rights and duties arising as a result of adjustment of individual claims were referred to as "interpretations," and were evidenced by confirmatory correspondence contained in respondent's files and those of the General Committee of Adjustment, BofLE, in San Francisco, California. (Affidavit of J. P. Colyar and Exhibits A through O thereto, R. 187, 193-218)⁵

(Over the years in question the negotiating process between the San Diego & Arizona Eastern Railway and the BofLE was between the BofLE General Chairman, whose office was in San Francisco, and respondent's General Manager in Los Angeles. Conferences were held in Los Angeles. The same BofLE General Chairman negotiated with officials of the parent Southern Pacific Company's personnel department in San Francisco for agreement covering engineers employed on that company's Pacific Lines.)

At rare intervals the contracting parties would arrange for publication of a printed booklet purporting to be the "Agreement." On December 30, 1954, the most recently published booklet bore the date of November 30, 1938. There appeared in this printed booklet no provision for compulsory retirement.

⁵Mr. Colyar has been BofLE General Chairman in San Francisco since 1947.

Article 35 thereof conferred seniority rights upon engineer employees by means of the following language:

"Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as engineer.

* * *

"Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment."

Article 47 of the printed booklet of November 30, 1938, established the principle of continued employment, in the absence of good cause for termination, or suspension, thereof as follows:

"No engineer shall be suspended or discharged, except in serious cases, where fault is apparent beyond a reasonable doubt, until he has had a fair and impartial hearing before the proper officials."

On December 30, 1954, the date of petitioner's disqualification, there resided in the files of respondent and the BofLE in San Francisco a series of letters evidencing agreement, effective January 1, 1945, to add to Article 9, Section 1(c) of the SD&AE-BofLE agreement, a provision identical to the then existing Article 12, Section 1(c) of the agreement between the Southern Pacific Company (Pacific Lines) and BofLE,⁶ as follows:

"Engineers assigned to regular runs, who through no fault of their own are not used

⁶Hereinafter referred to as "SP-BofLE agreement."

thereon and their runs are worked in whole or in part, will be allowed the full mileage of their assignments."

Additionally, said letters evidenced agreement from that date forward "to applying interpretations made on articles in Pacific Lines Engineers' Agreement [SP-BofLE agreement] that are similarly worded in SD&AE Engineers' Agreement to SD&AE Engineers' Agreement." (Exhibit H, Affidavit of J. P. Colyar, R 204-206)

At said time there also resided in said files a series of letters pertaining to the grievance of an engineer employee on the Southern Pacific Company who had been deprived of his regular run by reason of company-claimed physical disability. (Exhibits K and L, Affidavit of J. P. Colyar, R. 209-213) The claim was adjusted amicably in conference and, as evidenced by letter of November 13, 1947, led to agreement between the Southern Pacific Company and BofLE on the general problem of disputes as to physical fitness and consequent claimed loss of "regular run . . . through no fault of their own" by engineers held out of service upon a claim of physical unfitness. This agreement was memorialized in said letter of November 13, 1947, as follows:

"We further advised you, with the understanding that it is the company's responsibility to prescribe physical standards required of employees to qualify them for service and to remain in service, that we were agreeable in any case where an engineer was removed from his position on account of his physical condition and he desires

the question of his physical ability to conform to prescribed physical standards to be determined, the management was agreeable to setting up a special panel of doctors consisting of one doctor selected by the company, one doctor selected by the employee or his representative, the two doctors thus selected to confer and appoint a third doctor specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering. The management and the engineer will each defray the expenses of their respective appointee, and will each pay one-half of the fee and traveling expenses of the third appointee. This panel of doctors upon completing their examination will make a full report in duplicate, one copy each to be sent to the general manager and the engineer. At the time of making the report a bill for the fee and traveling expenses, if there be any, of the third appointee shall be made in duplicate, one copy to be sent to the general manager and one copy to the engineer." (Exhibit L to Affidavit of J. P. Colyar, R 211-213)

According to the affidavit of J. P. Colyar, General Chairman of the BofLE, which petitioner submitted to the District Court in support of his motion to be relieved from the operation of summary judgment, this was an *interpretation* placed on Article 12, Section 1(c) of the SP-BofLE agreement, and, since Article 9, Section 1(c) of the SD&AE-BofLE agreement was not just similarly, but identically, worded, it constituted an *interpretation* to be placed on Article 9, Section 1(c) of the SD&AE-BofLE agreement pur-

suant to the previous agreement of January 1, 1945. The affidavit stated, in part:

"By reason of the foregoing, since November 13, 1947 and to and including December 30, 1954, the date Mr. F. J. Gunther was removed from service by the San Diego & Arizona Eastern Railway Company, the SD&AE-BofLE agreement contained a provision whereby, in the event a SD&AE engineer was removed from service on account of his physical condition by the company and the engineer desired the question of his physical ability to conform to prescribed physical standards to be further investigated and determined, a special panel of physicians consisting of one doctor selected by the company, one doctor selected by the employee, and a third doctor selected by the two so appointed, was to examine the employee and the report of such panel accepted as determinative of the employee's physical fitness to continue in service." (R 191)

According to the affidavits of petitioner and his counsel, submitted in support of said motion, neither was aware of the existence of the above described correspondence, and the agreement thereby evidenced, until approximately four months following grant of respondent's second motion for summary judgment in the second Gunther case.

Upon his physical disqualification on December 30, 1954, petitioner, alleging absence of physical infirmity and supporting same with the written report of W. C. Hall, M.D., a San Diego specialist in internal medicine, sought relief from the First Division of the National Railroad Adjustment Board. This claim, by

Award 17 161 of October 6, 1955, was denied without prejudice on the ground that Dr. Hall had not expressed the opinion that he deemed petitioner physically qualified to perform the duties required of an engineer.

Petitioner promptly obtained a supplemental report from Dr. Hall in which he stated that he knew of no such work which petitioner was not capable of performing. On resubmission of the claim, and deadlock by the carrier and labor members of the Board, the case was referred for decision by a referee appointed by the National Mediation Board. (See 45 U.S.C., section 153(1)) The referee, finding a good faith dispute of opinion between respondent's chief surgeon and Dr. Hall, asserted the power and propriety of establishment by the Board of a three-physician panel to examine petitioner, and phrased the Board's Finding in support of its Award 17 646⁷ as follows:

"If the decision of the majority of such Board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with back pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physician." (R 8)

The parties complied with the award, and a neutral physician, John H. Schlappi, M.D., was selected. He examined petitioner and reported:

"It is my opinion at the present time he has no physical defects which should prevent him from

⁷Award 17 646 of October 2, 1956, is Appendix D hereto.

carrying on his usual occupation. I will not comment on the question as to whether a man of seventy-two, no matter what his physical condition, should be employed as an engineer because that is a matter of general policy and experience of the railroad."

At this point respondent's compliance with Award 17 646 ended. Reinstatement of petitioner was refused.

Petitioner then filed, pursuant to the authorization of 45 U.S.C., section 153(p), his petition to the District Court to enforce said Award. This initiated *Gunther I*. On respondent's motion for summary judgment, the District Court found Award 17 646 to be without sufficient finality to support an enforcement action and dismissed the petition on the authority of *Smith v. Louisville & Nashville R.R.* (S.D. Ala. 1953) 112 F.Supp. 388. (*Gunther v. San Diego & Arizona Eastern Ry.* (S.D. Cal. 1958) 161 F.Supp. 295)

The Fifth Circuit rejected the rationale of *Smith* and *Gunther I* in *Hodges v. Atlantic Coast R.R. Co.* (5th Cir. 1962), *supra*, 310 F.2d 438.

Prior to such judgment of dismissal petitioner re-submitted his claim to the First Division of the National Railroad Adjustment Board, this time supplementing same with the report of Dr. Schlappi. Again the carrier representatives and the labor representatives were equally divided, and a referee was appointed by the National Mediation Board. The result was an Interpretation* (45 U.S.C., section 153(m)) of

*The Interpretation and Award of October 8, 1958, is Appendix E.

Award 17 646, which concluded as follows:

"The issue of fact upon which the prior Award 17 646 was conditioned having been determined in favor of claimant, said conditional award should be made absolute and final and the claim sustained as therein provided.

"AWARD: Claim sustained for reinstatement with pay for all time lost from October 15, 1955 pursuant to rule on the property."

This Award was dated October 8, 1958. Petitioner's attempts to obtain voluntary submission by respondent to the Board's mandate were unavailing. Concerted economic action to enforce same was contraindicated by the decision of this Court in *Brotherhood of R. Trainmen v. Chicago River & Indiana R. Co.* (1957) 353 U.S. 30, 77 S.Ct. 635. Petitioner's pre-science in this regard was confirmed by the subsequent decision of this Court in *Brotherhood of Loc. Eng. v. Louisville & N. R.R. Co.* (1963) 373 U.S. 33, 83 S.Ct. 1059.

Thus, on September 26, 1960, within the two-year limitation period of 45 U.S.C., section 153(q), petitioner filed again with the District Court a petition seeking the court's assistance in implementation of the Board's award. This initiated *Gunther II*.

On the first motion for summary judgment interposed by respondent, the District Court rejected the assertion of the statute of limitations and the doctrine of res judicata as barring the claim. However, insofar as the motion was based upon the ground that, in establishing the three-physician panel and relying upon

its findings to support its award the Board had exceeded its jurisdiction, the court denied the motion without prejudice to its renewal. (*Gunther v. San Diego & Arizona Eastern Ry.* (S.D. Cal. 1961) 192 F.Supp. 882)

Respondent then moved for summary judgment a second time, renewing its claim that the award and order sought to be enforced was *ultra vires* and, hence, unenforceable.

It was the substance of respondent's affidavits submitted in support of the motion that the 1938 booklet was the entire collective bargaining agreement in effect on December 30, 1954, and that it contained no provision limiting respondent's right to determine the physical qualifications of its employees.

Petitioner filed an affidavit in opposition, asserting the booklet language providing for continuing employment in the absence of good cause for dismissal or discipline and for preferential employment based upon seniority. Said affidavit asserted the ambiguity, requiring extrinsic evidence for its clarification, created by the existence of this language and the absence of any provision for protecting the employee against loss of such rights upon resort by respondent to the simple expedient of ex-parte physical disqualification.

Petitioner further asserted, by said affidavit, that contractual limitation upon respondent's right to determine the physical fitness of its engineer employees existed by virtue of the language conferring right to continued employment in the absence of good cause for termination or suspension and the right to prefer-

ence based on seniority, and the custom and practice of the parties to the agreement in the day-to-day interpretation and application thereof in adjusting disputes as to the physical fitness of engineer employees to perform their assigned tasks. Petitioner thus posed an issue of fact for trial, to wit, whether the agreement, as interpreted with the aid of evidence extrinsic to said printed booklet, provided for implementation of the right to continued employment in the absence of good cause to suspend or terminate same, and the right of seniority, by review of respondent's ex-parte determination of physical unfitness—a provision which, if it existed, would, of course, limit respondent's "residual right" to determine the physical fitness of its employees.

Respondent's second motion for summary judgment was granted, and the petition for enforcement of the Board's order of reinstatement was thus dismissed without a hearing on the merits. (*Gunther v. San Diego & Arizona Eastern Ry. Co.* (S.D. Cal. 1961), 198 F.Supp. 402)

Following the docketing of his appeal to the Court of Appeals for the Ninth Circuit, petitioner discovered the above described documentary evidence of the existence, as of December 30, 1954, of a contractual provision for a three-physician panel to determine disputes as to physical fitness. His motion under Rule 60(b) of the Federal Rules of Civil Procedure to be relieved from the operation of the summary judgment was denied. The District Court did not deem sufficient his explanation that his failure to produce said evi-

dence on the hearing of the motion for summary judgment was due to the fact that he did not have access to the files of the rival union. It was also the view of the District Court that "petitioner has not produced and would not be able to produce at trial any evidence which could lead to a determination in his favor." (R 314)

Petitioner's appeal was perfected from both the summary judgment and the denial of his Rule 60(b) motion. The Court of Appeals affirmed the judgments below.

REASONS FOR GRANTING THE WRIT

The decisions below involve a good deal more than deprivation of a single railroad worker's right to a hearing upon the merits of his claim, as vindicated by the National Railroad Adjustment Board, to reinstatement and back pay. They constitute a stubborn refusal by the District Court and the Court of Appeals to "take the findings of these divisions of the Railroad Adjustment Board as they come and to do what they can with them." (*Kirby v. Pennsylvania R. Co.* (3d Cir. 1951) 188 F.2d 793, 796)

The Court of Appeal's determination that petitioner's request for enforcement of the Board's award of reinstatement with back pay presents no dispute "growing out of a grievance or question of contract interpretation" (Appendix B, *infra*, page ix) is, of course, in direct conflict with the Board's determination that:

"It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employees to remain in service. It is true also that the employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service." (Appendix D, *infra*, pages xviii-xix)

In asserting its precedence in the business of ascertaining what are the rights and duties of employer and employee as established by the *sui generis* method of collective bargaining in the railroad industry, the Court of Appeals has disregarded the "expertise" (*Elgin, J. & E. Ry. Co. v. Burley* (1946) 327 U.S. 661, 664, 66 S.Ct. 721) of the Board in this field of endeavor, and the *prima facie* value, or presumptive validity, of the work of the Board. The inconsistency, in principle, between the Court of Appeal's decision herein and the rationale underlying this Court's decision in *Elgin, supra*, and that of the Court of Appeals for the District of Columbia in *Washington Terminal Co. v. Boswell* is apparent. In *Washington Terminal* the late Justice Rutledge described the substantive effect of Adjustment Board awards as follows:

"The statute also relieves the employee of another burden. It provides that the enforcement suit 'shall proceed in all respects as other civil suits, except that on the trial . . . the findings and order of the division of the Adjustment Board

shall be prima facie evidence of the facts therein stated.' 45 U.S.C.A. § 153, First (p). The burden of proof, in making a prima facie case, may be financial as well as procedural, and it may be heavy. The statute relieves the employee of this, at least to some extent, when he introduces the findings and order in evidence. Though they may not make his case finally, they do so initially. They also bring to the court the weight of decision on facts and law by men experienced in contracts, disputes and proceedings of this special and complicated character. The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony." (*Washington Terminal Co. v. Boswell* (D.C. Cir. 1941) 124 F.2d 235, 241, affirmed by an equally divided court, 319 U.S. 732, 63 S.Ct. 1430)

See also, *Hanson v. Chesapeake & Ohio Ry. Co.* (D.C. W. Va. 1961) 198 F.Supp. 325; *Russ v. Southern Ry. Co.* (E.D. Tenn. 1963) 218 F.Supp. 634.

The decision of the Court of Appeals herein, like those of the District Court, demonstrates judicial inability to recognize the distinctive nature of agreements resulting from the collective bargaining process. The Court has accepted the erroneous view that the booklet of November 30, 1938—the document which the District Court described as a “barebone” agreement—constitutes the only evidence as to the agreement of the parties. By asserting that from the absence of language in the booklet specifically limiting respondent’s right to determine physical fitness of its employees the conclusion inevitably follows that no such limitation exists, the Court ignores the finding of the Board to the contrary and, also, the assertions of fact in petitioner’s affidavit filed in opposition to the second motion for summary judgment wherein he spelled out the role of custom and practice in the interpretation and application of the agreement as an evidentiary source.

Custom and practice does provide evidence of contractual obligations and rights. In *Order of Railway Conductors v. Pitney* (1946) 326 U.S. 561, 66 S.Ct. 322, 325, this Court has noted the importance of evidence as to usage, practice and custom as follows:

“For O.R.C.’s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agree-

ments by evidence as to usage, practice and custom that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue."

If the case at bar signified only a failure by the courts below to heed the established rule prohibiting summary judgment unless the record makes it crystal clear that there are no factual issues for trial, this petition would not be filed. But, it signifies much more than that. It constitutes precedent which is in conflict, in principle, with the authorities cited above which, by giving full credit to the language of 45 U.S.C., section 153(p) of the Railway Labor Act—"The findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated"—would seem to preclude dismissal of a petition to enforce a final award of the Board on motion for summary judgment.

Additionally, the decision of the Court of Appeals conflicts, in principle, with the decision of the Third Circuit in *Kirby v. Pennsylvania R. Co.* (1951) *supra*, 188 F.2d 793, and the more recent decision of the Fifth Circuit in *Hodges v. Atlantic Coast R. Co.* (1962) *supra*, 310 F.2d 438.

In both of these decisions there is recognition by the Court of Appeals that the role of the federal judiciary in entertaining petitions to enforce Adjustment Board

awards is to assume a realistic approach to the work of the Board, to recognize the presumptive validity of the Board's findings as to what the collective bargaining process has established as being the contractual rights and duties of the parties, and to suppress the judicial tendency to minimize the fact finding capacities of an administrative tribunal.

Finally, the Court of Appeals decision is out of step with recent decisions of this Court which enlarge the credit to be accorded to the role of the arbitration tribunal in the disposition of claims arising out of collective bargaining agreements and profoundly limit the remedies of railroad workers who assert claims of contract violation against their employers.

There is a close analogy between the role of the Adjustment Board in determining disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" (45 U.S.C., section 153(i)), and that of an arbitration tribunal acting pursuant to a collective bargaining agreement provision like those involved in the cases commonly referred to as the Steelworkers trilogy. (*United Steelworkers of Amer. v. American Mfg. Co.* (1960) 363 U.S. 564, 80 S.Ct. 1343, *United Steelworkers of Amer. v. Warrior & Gulf N. Co.* (1960) 363 U.S. 574, 80 S.Ct. 1347, and *United Steelworkers of Amer. v. Enterprise W. & C. Corp.*, 363 U.S. 593, 80 S.Ct. 1358) These authorities stand for the general proposition that the public interest in orderly adjustment of differences between industrial employers and their employees is best served by ju-

dicial recognition of the jurisdiction of the instrumentalities established for the specific purpose of adjusting and arbitrating such differences.

Thus, in the *American Mfg. Co.* case this Court said—"The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or *determining whether there is particular language in the written instrument which will support the claim.* (363 U.S. 564, 568, 80 S.Ct. 1343, 1346, emphasis added) And, in the *Warrior & Gulf* case there was agreement with the observation that "It is not unqualifiedly true that a collective bargaining agreement is simply a document by which the union and employees have imposed upon management limited, *express* restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. * * * Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop *which implements and furnishes the context of the agreement.*" (363 U.S. 574, 579, 580, 80 S.Ct. 1347, 1351, emphasis added)

Also in the *Warrior & Gulf* case this Court recognized that "When an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected

from interference by strike." (363 U.S. 574, 583, 80 S.Ct. 1347, 1353)

Prior to the decisions above discussed, this Court had held that the Norris-LaGuardia Act did not deprive District Courts of power to enjoin railroad workers from striking to obtain redress of a grievance cognizable by the Adjustment Board. (*Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.* (1957) 353 U.S. 30, 77 S.Ct. 635) Thus, the remedy of an aggrieved railroad worker was limited to the grievance procedure, including resort to the Adjustment Board, outlined in 45 U.S.C., section 153(i) et seq.; his resort to self help, in concert with his fellow employees, could be barred by an injunction.

And then, in *Brotherhood of Locomotive Engineers v. Louisville & N. R. Co.* (1963) 373 U.S. 33, 83 S.Ct. 1059, the *Chicago River* rule was extended to bar the remedy of such self help to require the employer to implement an Adjustment Board award in the employee's favor. Thus, insofar as claims cognizable by the Adjustment Board are concerned, the "no-strike clause" mentioned in the *Warrior & Gulf* case exists in the railroad industry by virtue of this Court's decisions. Railroad workers must rely on the Board, and not look to their own economic strength, in asserting contractual rights, and they must rely on the federal judiciary, and not their economic strength, when the employer refuses to comply with a Board award vindicating such a right.

All of this militates strongly in favor of a friendly, rather than hostile, reception to Board awards by the

federal judiciary, and demonstrates the inconsistency of the decision herein with the above discussed decisions of this Court.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Dated, December 2, 1964.

CLIFTON HILDEBRAND,
Attorney for Petitioner.

CHARLES W. DECKER,
Of Counsel.

(Appendices A, B, C, D and E Follow)

Appendix A

SEC. 3. Section 3 of the Railway Labor Act is amended to read as follows:

"NATIONAL BOARD OF ADJUSTMENTS—GRIEVANCES—

INTERPRETATION OF AGREEMENTS

* * * *

"(1) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective

parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

“(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

“(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

“(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order

of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

“(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.”

• • • •

Appendix B

***United States Court of Appeals
For The Ninth Circuit***

No. 18,724

F. J. GUNTHER,***Appellant,*****vs.****SAN DIEGO & ARIZONA EASTERN****RAILWAY COMPANY, a corporation,*****Appellee.***

[Sep. 4, 1964]

**On Appeal from the United States District Court
for the Southern District of California,
Southern Division**

**Before: POPE, HAMLEY and MERRILL, Circuit
Judges**

MERRILL, Circuit Judge:

Appellant initiated this proceeding on November 28, 1960, by filing in the District Court for the Southern District of California a petition under 45 U.S.C. 153

(p),¹ seeking enforcement of an award and order of the First Division of the National Railroad Adjustment Board. That award and order directed that appellant be reinstated by the Railroad to active employment, with pay for lost time. The Railroad successfully contended before the District Court that the award and order was made in excess of the jurisdiction of the Adjustment Board, and was therefore not subject to a judicial order of enforcement. Summary judgment was rendered in favor of the Railroad. Appellant subsequently moved, under F.R.C.P. Rule 60(b), to be relieved of judgment on the ground of newly discovered evidence. This motion was denied by the court. Appeals from both the judgment and subsequent order were taken and have been consolidated.

On December 30, 1954, shortly after appellant's seventy-first birthday, the Railroad removed him from active service. He had been employed by the Railroad since December, 1916, and his employment since December, 1923, had been as locomotive engineer.

¹"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner * * * may file in the District Court * * * a petition setting forth briefly the causes for which he claims relief, and the order of the Division of the Adjustment Board in the premises. Such suit in the District Court shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, * * *. The District Courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (45 U.S.C. 153(p) (1958).)

The record establishes without dispute² that appellant's removal was under the following circumstances:

"Locomotive engineers employed by the San Diego & Arizona Eastern Railway Company are and have always been required to take and pass periodic physical examinations and reexaminations to determine their fitness to remain in service. In the year 1954 these requirements provided, and they still provide, that employees of age seventy and over must take and pass such a physical examination every three months. In accordance with the foregoing rule, Mr. Gunther reported for physical examination on November 24, 1953, and for additional examinations (reexaminations) in each successive three-month period to and including December 15, 1954. On the latter date Mr. Gunther reported for and took his physical examination; and on the basis of the findings during this examination the examining physicians determined that he was no longer physically qualified to remain in service as a locomotive engineer. These findings were reviewed at the Southern Pacific Hospital in San Francisco by the Chief Surgeon, who concurred in the findings and opinion that Mr. Gunther's heart was in such condition that he would be likely to suffer an acute coronary episode. Based upon this conclusion, Mr. Gunther was physically disqualified, as aforesaid, on December 30, 1954."

Following removal, appellant submitted to an examination by a physician of his own choice, and on the basis of that doctor's favorable report requested of the Railroad that a three-doctor board be appointed

²By affidavit of appellee's personnel manager.

to reexamine his physical qualifications for return to service. When this request was denied appellant filed with the Railroad Adjustment Board a claim for reinstatement and back pay. The claim was presented on appellant's behalf by the Brotherhood of Locomotive Firemen and Enginemen, of which organization appellant was a member and officer. The designated collective bargaining representative of the Railroad's employees, however, was the Brotherhood of Locomotive Engineers and it was the contract reached between that organization and the Railroad which constituted the applicable collective bargaining agreement.

Before the Adjustment Board appellant's claim was opposed by the Railroad on the ground that there was no rule providing for the appointment of a neutral medical board and that the Railroad's judgment of appellant's fitness, based upon the decision of its Chief Surgeon, was not subject to review.

The Board nevertheless ordered a neutral board to be established. Its order of October 2, 1956, provided:

"It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employees to remain in service. It is true also that the employee has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employee has wrongfully been deprived of service. If carrier through its medical staff has removed an employee from service in good faith, on the basis of a fair standard of fit-

ness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

Since determination of the facts necessary to enable the Division to make proper award on such issue requires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians.

While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians. If the decision of the majority of such board shall support the decision of carrier's chief surgeon, the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians."

Appellant was duly examined by the neutral board and the Adjustment Board subsequently found "that

the majority of said board properly examined claimant and that their findings and decision therefrom did not support the decision of carrier's chief surgeon but that they found and decided that claimant had no physical defects which would prevent him from carrying on his usual occupation as engineer." The claim of appellant was sustained with pay for all time lost from October 15, 1955. It is for enforcement of this award and order that this proceeding was instituted.

The function of the Railroad Adjustment Board is set forth as follows in 48 Stat. 1189 (1934), 45 U.S.C. 153(i) (1958):

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The First Division of the Board, by § 153(g), is given authority over disputes involving engineers.

The issue here is whether any dispute growing out of a grievance or question of contract interpretation is presented by appellant's removal from active serv-

ice upon the ground of physical disqualification. We agree with the District Court that no such dispute is presented.

It is clear from the record that the Railroad has always reserved to itself the right and responsibility of determining the qualifications of its employees, including, importantly, the physical fitness of its locomotive engineers. It would seem to us to be a most elementary proposition that in the public interest the responsibility for such determinations must be clearly fixed, and that in the absence of contrary provisions in the applicable collective bargaining agreement such responsibility must rest with the Railroad.³

There was no contrary provision in the contract between the Railroad and the Brotherhood of Locomotive Engineers as of the date of appellant's removal.

Appellant refers us to the contract's general provisions respecting seniority rights and right to continue active employment in the absence of good cause

³While it may well be that an arbitrary exercise of its rights and responsibilities by the Railroad could form the basis of a grievance, the Board's own order, as we have heretofore quoted it, states that reinstatement should be limited to such cases. If, states the Board, there is a lack of good faith in the removal or lack of a fair standard of fitness or adequate determination, the claimant has been wrongfully removed. Otherwise, states the Board, there is no right to reinstatement.

Nowhere in the record do we find any suggestion of a lack of good faith on the part of the Railroad, or that absence of the likelihood that an acute coronary episode might be suffered is not a fair standard of fitness for a locomotive engineer; or that the determination of the Railroad surgeons was not "adequate" (which we would suppose to relate to the qualifications of the medical examiners and the sufficiency of their examination). The record simply shows that a "majority" of the neutral board disagreed.

for discontinuance thereof.* It is clear from a reading of these provisions that they deal with discharge for cause, which is not to be confused with physical disqualification.

In our judgment, the Board exceeded its jurisdiction. It dealt with a dispute entirely foreign to the collective bargaining contract or to any question of interpretation arising under it.

Appellant contends that the determination of this dispute by the Adjustment Board and its decision to entertain the dispute should be accepted by this Court under the arbitration-encouraging rules laid down in

"Article 35—Seniority

Section 1

Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as an engineer.

Section 3 (b)

Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment." (Gunther affidavit filed May 29, 1961. R. 100.)

"Article 47—Investigations

Section 1 (b)

No engineer shall be suspended or discharged, except in serious cases, where a fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials.

Section 1 (e)

If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid rate as set forth in Appendix 'B' for time lost on such account.

Article 38—Reduction of force

Section 1 (a)

When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off may, if they so elect, displace any fireman their junior under the following conditions:

Second: That when reductions are made they shall be in reverse order of seniority." (Gunther affidavit filed May 29, 1961. R. 100.)

United Steel Workers v. Warrior & Gulf. Nav. Co. (1960) 363 U.S. 574; *United Steel Workers v. American Mfg. Co.* (1960) 363 U.S. 564, and decisions of like import.

We do not find that line of authority in point. Those cases arose under § 301 of the Labor Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958), and dealt with arbitration provisions of collective bargaining agreements. In those cases the parties were required to resolve their disputes as to the contract's meaning by a method upon which they had themselves agreed. Here the parties have not agreed to arbitration. Resolution of their disputes by the Adjustment Board is imposed by statute and the basic issue is not as to the meaning of what the parties have said but the meaning of what Congress has stated. Congress has (see footnote 1) provided for judicial review of the Board's decision and that the Board's findings and order shall be "prima facie evidence of the fact." The reviewing court is authorized to enter such judgment "as may be appropriate to enforce or set aside the order * * *." It would seem apparent that Congress intended that the courts should have full power to review the question whether a dispute as defined by Congress (rather than by the parties themselves) exists.

Appellant asserts that in any event summary judgment was a premature and precipitate disposition of the case upon the merits, and that issues of fact were presented or suggested by the record. In this connection it contends that the record on motion for

summary judgment did not show that the collective bargaining agreement before the court was the complete agreement, but on the contrary showed that it had been amended in some respects, thus suggesting that it might have been amended in others as well; that with respect to the extent of appellant's rights the agreement was vague and uncertain, and that these uncertainties remain to be resolved.

We agree with the District Court that however vague and uncertain the agreement before it might have been as to appellant's rights in other respects, it is clear that it conferred on him no right to challenge the Railroad's good-faith judgment as to his physical fitness. If the agreement between the parties in any material respects had been amended, appellant had ample opportunity to present this fact on motion for summary judgment. The motion granted was the second motion made by the Railroad. The first had been denied in order to give appellant the opportunity to present evidence respecting the contract. *Gunther v. San Diego & A. E. Ry.* (S.D.Cal. 1961) 192 F. Supp. 882. The Court explicitly pointed out in this respect:

"If counsel for the petitioner denies that Exhibit A of said affidavit as the same appears in the Clerk's file, is not the contract in controversy, then there is, of course, need for clarification."
192 F. Supp. at 887.

Appellant was also invited to show, by affidavit, what ambiguities in the contract he had in mind, and what parol evidence he deemed important in resolving them.

It was only when appellant failed to respond to the Court's invitation that, on a renewed motion, summary judgment was ordered. Under these circumstances this was not error.

Judgment is affirmed.

On appeal from the order denying his § 60(b) motion, appellant contends that the Court improperly rejected his newly discovered evidence.

The record before the District Court showed that while, at the time of appellant's removal from active service, there was no agreement that physical fitness was to be decided by a three-doctor panel, such an agreement was reached in 1959. Appellant by his newly discovered evidence sought to prove by correspondence between the Southern Pacific Company (appellee's parent) and the Brotherhood of Locomotive Engineers that in fact such an agreement had been reached in 1944, ten years before his removal.

The Court ruled "that the evidence offered was neither newly discovered nor of such a nature that it could not have been discovered by due diligence in time to move for a new trial."

Appellant attacks this determination. He explains his delay in learning of this evidence by the fact that he was a member not of the Brotherhood of Locomotive Engineers but of a rival union and that the correspondence establishing the agreement was not available to him.

This may explain a lack of knowledge but it does not justify a failure to search or to inquire. More

than a year passed between the denial of the Railroad's first motion for summary judgment (and the Court's invitation to appellant to present evidence of the agreement) and the filing of appellant's 60(b) motion. Denial of the motion under these circumstances was neither error nor abuse of discretion.

On its order denying 60(b) relief, the Court is affirmed.

Appendix C

*United States Court of Appeals
For The Ninth Circuit*

No. 18,724

F. J. GUNTHER,

Appellant,

vs.

SAN DIEGO & ARIZONA EASTERN

RAILWAY COMPANY, a corporation,

Appellee.

JUDGMENT

APPEAL from the United States District Court for the Southern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 4, 1964.

Appendix D

FORM 1

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

With Referee Mortimer Stone

AWARD 17 646

DOCKET 33 531

PARTIES (Brotherhood of Locomotive Firemen and
 TO (Enginemen
 DISPUTE (San Diego and Arizona Eastern Railway
 (Company

STATEMENT "Request for reinstatement of Engineer
 OF CLAIM: F. J. Gunther to service with all seniority
 rights unimpaired and pay for all time
 lost account of physical disqualified and
 taken out of service December 30, 1954.

FINDINGS: The First Division of the National Rail-
 road Adjustment Board, upon the whole
 record and all the evidence, finds that the parties
 herein are carrier and employe within the meaning of
 the Railway Labor Act, as amended, and that this
 Division has jurisdiction.

Hearing was waived.

Claim of engineer for reinstatement in service and
 pay for time lost. Shortly after his 71st birthday
 claimant was disqualified from service by the chief
 surgeon on the basis of a physical examination by a
 company physician at Los Angeles. Upon his request
 he was then sent to the Southern Pacific General Hos-
 pital at San Francisco and there examined by car-

rier's medical superintendent following which the chief surgeon determined that he should not be returned to service.

Thereupon claimant went for examination to a recognized specialist at San Diego and on the basis of his report requested that a three doctor board be appointed to reexamine his physical qualification for return to service.

Upon denial of this request claim for reinstatement and back pay was filed in this Division resulting in Award 17 161 in which the claim was dismissed without prejudice on the ground that there was no showing whether or not claimant's physician and the company physicians disagreed as to claimant's physical qualifications. Now the claim has been progressed again with the inclusion of further statement by claimant's physician.

Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appointment of a neutral medical board as here sought and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.

It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employes to remain in service. It is true also that the employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to

determine whether the employe has wrongfully been deprived of service.

If carrier through its medical staff has removed an employe from service in good faith, on the basis of a fair standard of fitness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

Since determination of the facts necessary to enable the Division to make proper award on such issue requires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians.

While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians.

If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15,

1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians.

AWARD: Claim disposed of per Findings.

**National Railroad Adjustment Board
By Order of First Division**

Attest: J. M. MacLeod

Executive Secretary

**Dated at Chicago, Illinois,
this 2nd day of October 1956.**

Appendix E

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

With Referee Mortimer Stone

INTERPRETATION

AWARD 17 646

DOCKET 33 531

PARTIES (Brotherhood of Locomotive Firemen and
TO (Enginemen
DISPUTE (San Diego and Arizona Eastern Railway
(Company

INTERPRETATION

This docket presents claim previously before this Division with the present Referee sitting as a Member, which resulted in Award 17 646. As appears therein claimant had been held by carrier's chief surgeon to be no longer physically qualified to remain in service and the Division determined that there was sufficient disagreement as to claimant's physical condition to justify inquiry and finding by a board of three physicians, as not unusually required. It was declared that if the decision of the majority of such board should support the decision of carrier's chief surgeon the claim would be denied; if not, it would be sustained with pay pursuant to rule on the property, from October 15, 1955.

On June 30, 1958 claimant filed with the Division a supplemental submission setting out that following said award a board of three physicians had been

agreed on and established as provided for therein, and that the findings and decision of the majority of said board did not support the decision of carrier's chief surgeon but found that claimant had no physical defect which would prevent him from carrying on his usual occupation, but that carrier advised claimant that "the findings of the three doctor board have been reviewed by the chief surgeon and interpreted to be such that you should not be returned to duty", and refused to reinstate claimant or pay him for time lost. Wherefore claimant sought a new or supplemental award or an interpretation, to make absolute his right to reinstatement and pay for time lost.

Carrier now requests permission to file an answer to petitioner's submission and asserts that the Referee has authority to resolve any question of procedure in the matter before him. Claimant's submission was filed more than ninety days before the request without any request appearing for extension of time. In the meantime the Division deadlocked on the disposition of the dispute and it was submitted to the National Mediation Board which appointed a Referee; then the docket was given the Referee for study and thereafter on the day the matter came on for oral argument carrier made its request for permission to file answer. Even then no answer was tendered or time suggested when one might be prepared. In such situation, if the Referee has such authority as urged by carrier representatives permission would be denied. We find from the record that the statements set out in claimant's submission are true; that a board of

three physicians was selected by agreement of the parties for the purpose of determining claimant's physical qualification for service; that the majority of said board properly examined claimant and that their findings and decision therefrom did not support the decision of carrier's chief surgeon but that they found and decided that claimant had no physical defects which would prevent him from carrying on his usual occupation as engineer.

The issue of fact upon which the prior Award 17 646 was conditioned having been determined in favor of claimant, said conditional award should be made absolute and final and the claim sustained as therein provided.

AWARD: Claim sustained for reinstatement with pay for all time lost from October 15, 1955 pursuant to rule on the property.

National Railroad Adjustment Board
By Order of First Division
Attest: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois,
this 8th day of October 1958.

FILE COPY

Office-Supreme Court, U.S.

FILED

DEC 31 1964

JOHN F. DAVIS, CLERK

In the Supreme Court of the
United States

OCTOBER TERM, 1964

No. [REDACTED] 27

F. J. GUNTHER,

Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY, a corporation,

Respondent.

Brief in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 733

F. J. GUNTHER,

Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY, a corporation,

Respondent.

Brief in Opposition

QUESTION PRESENTED

Whether an Adjustment Board award rendered in excess of the Board's jurisdiction can be set aside in an enforcement proceeding upon motion for summary judgment.

STATEMENT OF THE CASE

This litigation concerns the refusal of Respondent railroad to return a locomotive engineer to active service upon the advice of its Chief Surgeon that the condition of his heart is such that he may suffer blackouts under the strain of his duties and would be a hazard to his fellow employees and the public. Respondent's locomotive engineers are required to take and pass physical examinations at intervals

of increasing frequency as their age advances. At age 70 this interval is three months. Petitioner took and passed four such quarterly examinations, but was disqualified for active service as a locomotive engineer upon the fifth examination at his then attained age of 71 years (App. B to Petition, page vi; R. 17-18).

Petitioner processed his claim for reinstatement to service and pay for time lost to the First Division, National Railroad Adjustment Board, pursuant to Section 3 First (i) of the Railway Labor Act (45 U.S.C., Section 3 First (i)). That Board declared the interpretation of the applicable agreement rules to be that if the Respondent carrier's medical staff has removed an employee from service in good faith predicated upon a fair and adequate physical examination, there is no right to reinstatement since there was no wrongful removal from service (App. D to Petition, p. xix). Instead of determining whether these guidelines were satisfied in this case, the Board ordered an arbitration of Petitioner's physical condition by a three-doctor panel and subsequently issued its Award and Order No. 17161 on October 8, 1958, simply adopting the purported three-doctor award as its own (App. E to Petition, pp. xxi-xxiii).

Respondent refused to make effective this award and order which circumvented the Board's own findings and imposed upon the carrier an arbitration not provided for in the collective bargaining agreement. Therefore, Petitioner exercised his right to seek enforcement of the purported order pursuant to 45 U.S.C. 153 First (p) by filing the instant action. The District Court and the Court of Appeals for the Ninth Circuit found that instead of interpreting and applying the provisions of the collective bargaining agreement, the Board exceeded its jurisdiction by

writing in a limitation upon Respondent's right to have its employees medically examined in good faith and by ordering an arbitration medical panel wholly without contractual sanction (App. B to Petition, pp. x-xii). Respondent's position is that the Railway Labor Act provides a method of making or changing agreements in Section 6 (45 U.S.C. 156); that Section 6 was invoked by the certified union in 1959 with the result that such an arbitration medical panel was adopted in the applicable agreement; that at no time prior to 1959 was there any such provision; and that the action of the Board was an unwarranted attempt to write an arbitration contract for the parties.

Throughout the one-year period when proceedings took place in the District Court, repeated statements were made to Petitioner by the Court that he should at least specify some evidence or showing which he could make to the Court in opposition to Respondent's affidavits (App. B to Petition, pp. xiii-xiv). Despite these statements, Petitioner did not produce any such affidavit or showing and it was only when he had failed to respond to the District Court's invitation that, on a renewed motion, summary judgment was ordered (App. B to Petition, p. xiv). Only after Petitioner had appealed this judgment did he seek to introduce the affidavits described in his brief on pages 7, 8, 9, 10, 15 and 16 under the guise of "newly discovered evidence". Under FRCP Rule 60(b) both courts below held that the evidence offered (dated 1945-1947, Petitioner's brief, pp. 7, 8) was neither newly discovered nor of such a nature that it could not have been discovered by due diligence in time to move for a new trial (R. 320; App. B to Petition, pp. xiv-xv). The summary judgment and the denial of the motion under Rule 60(b) were affirmed.

REASONS FOR DENYING THE WRIT

1. During the extended period of this litigation in the District Court, Petitioner produced no affidavit or indication of proposed proof that any three-doctor arbitration board was the subject of agreement with Respondent prior to 1959. Hence, any contention that he was deprived of a day in court by summary proceedings is without merit.

Petitioner had ample opportunity to discover and produce evidence to challenge the affidavits of Respondent. The District Court denied Respondent's first motion for summary judgment on March 27, 1961, in an opinion which invited Petitioner to present evidence with respect to any alleged limitation upon the right of Respondent to determine the physical fitness of its employees. (R. 53-55; App. B to Petition, pp. xiv-xv). Notwithstanding this invitation, the Petitioner presented no such evidence to the Court. Thereafter, on May 16, 1961, Respondent filed a second motion for summary judgment (R. 66-67) which was ultimately granted on October 27, 1961 (R. 159) and from which judgment appeal was taken to the Court of Appeals for the Ninth Circuit. While the appeal was pending and on June 5, 1962, Petitioner filed a motion pursuant to Rule 60(b) FRCP which was denied for various reasons, one of which was lack of due diligence (R. 320). In affirming this exercise of the discretion of the District Court, the Court of Appeals noted that Petitioner had failed to produce any evidence and had failed to search or inquire during the period of one year next following denial of the first motion for summary judgment mentioned above (App. B to Petition; pp. xiv-xv).

2. The issue in this case could not have any effect upon the rights of employees under the collective bargaining

agreement from and since 1959 when the union and Respondent carrier negotiated and adopted a three-doctor arbitration panel under the provisions of Section 6 of the Railway Labor Act (45 U.S.C. 156).

It is clear that no limitation existed upon Respondent's right to rely upon its doctor's determination in good faith of the physical fitness of locomotive engineers. The collective bargaining agreement contained no such limitation. The decision of the Adjustment Board itself cited no such provision (App. D and E to Petition, pp. xvii-xxiii). Instead the Board declared: "If the carrier through its medical staff has removed an employee from service in good faith . . . there is no right to reinstatement." (App. D to Petition, p. xix). The Board made no finding challenging the good faith of Respondent or its medical staff. Petitioner made no such claim either before the Adjustment Board or in Court (App. B to Petition; Footnote 3 on page x). Similarly it is not contended that the standard of fitness was unfair or not applied to his physical condition, adequately determined. In the face of this record the Adjustment Board exceeded its jurisdictional bounds in ordering arbitration by a panel of three doctors. No supporting agreement provision was cited because none existed. Such a provision was negotiated between the parties in 1959, approximately five years later (App. B to Petition, p. xiv). This new agreement provision would have been unnecessary and unsupported by consideration if the parties already had a three-doctor panel agreement. With this arbitration provision in the contract from and since 1959, the question in the instant case could not recur in connection with other locomotive engineers employed by Respondent.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Dated: December 29, 1964.

WALDRON A. GREGORY

WILLIAM R. DENTON

Attorneys for Respondent

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II

The rights and duties of railroad employers and employees arising out of the collective bargaining process are not restricted to those expressly and unambiguously stated in the most recently printed document purporting to be the agreement. The decisions below are in conflict with the growing body of federal substantive law applicable in suits to enforce rights arising out of the Railway Labor Act and collective bargaining conducted pursuant thereto 37

III

The order denying petitioner's Rule 60(b) motion was an abuse of equitable discretion; it was an unjustifiable refusal to recognize the obvious, to wit, that the underlying rights and duties of the parties to a collective bargaining agreement in the railroad industry are to be found in the continuing collective bargaining and dispute-adjusting process structured by the Act as well as the printed agreement and, on the basis thereof, to set aside the prior judgment which rested squarely upon the contrary view that the sole source of such rights and duties was the fifteen year old agreement 56

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1965

No. 27

F. J. GUNTHER,

Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY,

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R 226) is reported at 336 F. 2d 543.

The District Court rendered three opinions. The opinion accompanying order denying respondent's first motion for summary judgment (R 22) is reported at 192 F. Supp. 882. The opinion accompany-

ing its findings of fact, conclusions of law and judgment granting respondent's second motion for summary judgment (R 56) is reported at 198 F. Supp. 402. The opinion accompanying order denying petitioner's motion for relief from final judgment (R 207) was not reported.

JURISDICTION

The judgment of the Court of Appeals was entered September 4, 1964 (R 235). Petition for certiorari was filed December 2, 1964 and was granted March 1, 1965. The jurisdiction of this Court rests on 28 USC 1254 (1).

STATUTES INVOLVED

The statutes which the case involves are Sections 2 and 3 of the Railway Labor Act (c. 691, §§ 2-3, 48 Stat. 1186, 1189).

The statutes are printed in Appendix A hereto.

QUESTION PRESENTED

On October 8, 1958 the National Railroad Adjustment Board ordered respondent (hereinafter referred to as SD&AE) to reinstate petitioner to active service as a locomotive engineer and to pay him for time lost.

The order was based on an award which sustained petitioner's claim on the basis of an express finding by the Board that it had jurisdiction of the dispute

between petitioner and SD&AE, and of the parties, and an express finding that it had jurisdiction to determine, by reference to the findings of a neutral board of physicians, whether petitioner's removal from service constituted a proper assertion of the employer's right to determine, within proper limits, the physical fitness of its employees, or was a violation of petitioner's right to priority in service according to his seniority so long as physically qualified.

The question presented is whether the Railway Labor Act, which—

(1) confers jurisdiction on the Board to hear and determine disputes growing out of grievances or out of the interpretation or application of agreements, and

(2) confers jurisdiction upon federal district courts to entertain civil suits brought to enforce Board awards, and

(3) provides that, in such civil suit, the Board's findings are to constitute *prima facie* evidence of the facts therein stated—

together with other applicable federal substantive law, permitted the District Court, on SD&AE's motion for summary judgment, to make a finding as to the underlying rights and duties of the parties contrary to that of the Board and, on the basis thereof, to enter judgment setting aside the award thus precluding trial on the merits.

A subsidiary question is whether the District Court's adverse ruling on petitioner's motion to be

relieved from said judgment constituted an abuse of discretion in view of petitioner's clear showing, made in support of said motion, of evidentiary sources for said underlying rights and duties other than the document which, on the motion for summary judgment, the District Court treated as the sole such source.

STATEMENT

I.

STATEMENT OF THE PROCEEDINGS BELOW

Petitioner, F. J. Gunther, initiated this proceeding on September 26, 1960, by filing with the United States District Court for the Southern District of California, Southern Division, his petition for the relief provided by Section 3, First (p) of the Railway Labor Act (R 1-11). The order of the First Division of the National Railroad Adjustment Board (hereinafter referred to as "Board") which he sought to enforce¹ was the culmination of Board proceedings in which petitioner, acting through the Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as "BLF&E")² had pressed his claim for

¹The Board's Findings, Award and Order of October 2, 1956 are Exhibit A to the petition (R 5-7). Its Interpretation, Award and Order of October 8, 1958 are Exhibit B to the petition (R 9-11).

²At all times pertinent herein petitioner was a member of BLF&E and General Chairman for its members employed by respondent SD&AE (R 52).

reinstatement to the work assignment from which, on December 30, 1954, respondent SD&AE had removed him on the ground of physical unfitness.

The District Court, after denying SD&AE's first motion for summary judgment without prejudice to renewal to re-assert the court's lack of jurisdiction to entertain the petition,³ responded to SD&AE's second motion by making a finding, on the basis of the pleadings and evidence submitted by affidavits, that the order sought to be enforced was *ultra vires* and, hence, should be set aside.⁴

Following entry of judgment dismissing his petition pursuant to said finding and the docketing of his appeal therefrom to the United States Court of Appeals for the Ninth Circuit, petitioner sought and obtained remand of the record and cause to the District Court to enable him to seek from that court an order relieving him from said judgment pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure (R 103-104). This motion was made, and opposed, on affidavits. The result was an order⁵ denying same from which petitioner perfected an additional appeal. The two appeals were then heard on a consolidated record by the Court of Appeals and both the judgment

³The District Court's minute order and memorandum opinion accompanying same are printed at R 22-31. The opinion is reported at 192 F. Supp. 882.

⁴The District Court's opinion, with notes and exhibits, is printed at R 56-93. It is reported in 198 F. Supp. 402. The Findings of Fact, Conclusions of Law and Judgment are printed at R 93-97.

⁵The District Court's opinion and order are printed at R 207-219.

of dismissal and the subsequent order denying relief under Rule 60 (b) were affirmed.⁶

Much of the evidentiary matter set forth in the following statement of the case was not before the District Court when it dismissed petitioner's suit by summary judgment. Particularly, the evidence of continuing negotiations resulting in modifications of the existing collective bargaining agreement, as evidenced by the green booklet⁷ which purported to be the SD&AE-Brotherhood of Locomotive Engineers (hereinafter referred to as "BLE") agreement executed on November 30, 1938, and which the District Court deemed to be the applicable agreement as of December 30, 1954, was first presented to the District Court on petitioner's rule 60 (b) motion (R 105-139).

Any question as to whether an evidentiary item, as stated below, was available to the District Court in the summary judgment proceeding can be resolved by noting the record page number to which reference is made. References to pages 1 to 97 of the printed record are to pre-summary judgment materials. Ref-

⁶The opinion and judgment of the Court of Appeals is printed at R 226-235. It is reported at 336 Fed. 2d 543.

⁷This is the booklet with green cover reading—"Agreement—San Diego & Arizona Eastern Railway Company and Brotherhood of Locomotive Engineers—Rules Effective March 1, 1935—Revised Rates of Pay Effective October 1, 1937"—which was Exhibit A to the affidavit of SD&AE's Manager of Personnel filed in support of SD&AE's first motion for summary judgment (R 14-15). It was, by reference, also Exhibit A to his affidavit filed in support of SD&AE's second motion for summary judgment (R 40).

The parties have stipulated that it need not be printed and is to be treated as a documentary exhibit. It is attached to the original record transmitted to this Court at page 19 thereof (R 15, 40).

erences to pages 98 to 237 of the printed record are to post-summary judgment materials.

II.

STATEMENT OF THE CASE

Petitioner was employed by SD&AE in 1916 and assigned to work as a locomotive fireman (R 32). He became a locomotive engineer in 1923 (R 32). On December 30, 1954, when SD&AE removed him from service because its examining physicians concluded that his heart was in such condition that he would be likely to suffer an acute coronary episode (R 15, 33, 40-41), he was the most senior of SD&AE locomotive engineers (R 54).

SD&AE is a wholly owned subsidiary of the Southern Pacific Company (hereinafter referred to as "SP") (R 172). It operates a freight service in California between El Centro and San Diego in conjunction with the Tijuana and Tecati Railroad Company which operates through a portion of Mexico (R 178, 205). The office of the Vice President and General Manager is in Los Angeles (R 172). Its directors and non-operating officers, including the Vice President and General Manager, also hold official positions with the Southern Pacific Company (R 172). For example, the same individual, Mr. K. K. Schomp, whose office is at the headquarters of SP at 65 Market Street, San Francisco, is Manager of Personnel for each company (R 157, 172).

For many years prior to December 30, 1954 SD&AE employees classified as locomotive engineers were represented, for purposes of collective bargaining with the employer, by the BLE (R 172). Throughout this period, however, petitioner was a member of a rival organization, the BLF&E, and for a considerable portion thereof immediately preceding December 30, 1954 he was General Chairman for that organization and, in that capacity, represented BLF&E members employed by SD&AE (R 52, 91, 139-140). During said period and until July 1, 1958, when it lost its certification to the BLE (R 173), BLF&E was the certified representative for collective bargaining purposes of SD&AE employees classified as firemen, hostlers and hostler helpers (R 173-174). In 1946 and 1950 BLF&E disputed BLE's right to represent locomotive engineer employees of SD&AE but on both occasions was unsuccessful in the election held by the Mediation Board and BLE continued as the certified representative of this class (R 172-173, 179-185).

From the time when BLE became the representative for locomotive engineers on the SD&AE until the present, the process of making and maintaining agreements concerning rates of pay, rules and working conditions, and that of settling grievances or "claims" arising out of the interpretation or application of such agreements, was carried on by correspondence and conference between SD&AE's Vice President and General Manager in Los Angeles, or its Manager of Personnel or one of his assistants, in San Francisco, and the BLE officials who were headquartered in San

San Francisco.⁸ These BLE officials also negotiated and conferred with various officials of the Southern Pacific Company, including its Manager of Personnel, who was also Manager of Personnel for SD&AE, in their representation of locomotive engineers employed by SP and working on its Pacific Lines, those working on SP lines which formerly were the El Paso and Southwestern Railroad, and those working at the Nogales Yard of the Southern Pacific Company of Mexico. These units, like the SD&AE, were separate units for the purpose of collective bargaining (R 174).

From time to time during this period changes in the agreements which resulted from this collective bargaining process were initiated by the notification procedure provided for by Section 6 of the Railway Labor Act (45 USC § 156).⁹ Such changes were evidenced by writings executed by authorized representatives of the company and of BLE.¹⁰ So far as the record shows, such writings remained in the files of SD&AE or the parent Southern Pacific Company and of the General Committee of Adjustment, Brotherhood of Locomotive Engineers, in San Francisco.

At rare intervals the "agreement" was published in booklet form. Two examples of such printed docu-

⁸See, generally, correspondence attached to affidavit of J. P. Colyar as exhibits A through O thereto, R 111-139; affidavit of C. M. Buckley, R 154-157; affidavit of K. K. Schomp, R 157-158; affidavit of C. A. Ball, Jr., R 159-160; affidavit of L. M. Fox, Jr., R 161-163; affidavit of K. K. Schomp, R 171-205.

⁹See exhibits D, E, F, and G to affidavit of K. K. Schomp, R 185-194.

¹⁰See, e.g., exhibits M, N and O to affidavit of J. P. Colyar, R 134-139.

ments are of record. They are the green booklet purporting to evidence the SD&AE-BLE agreement executed November 30, 1938¹¹ and a red booklet entitled—"Agreement by and between Southern Pacific Company (Pacific Lines) and its Locomotive Engineers Represented by the General Committee of Adjustment of the Brotherhood of Locomotive Engineers Effective August 1, 1958."¹²

(The District Court, in its opinion accompanying its order denying petitioner's Rule 60 (b) motion, refers to another such booklet—"the Orange Covered Booklet"—the cover of which bears the notation—"Agreement by and between the San Diego & Arizona Eastern Railway Company and its Locomotive Engineers Represented by the Brotherhood of Locomotive Engineers Effective January 1, 1956" (R 210). Although the District Court includes this booklet as being one of three collective bargaining agreements on file as exhibits in this case, it was not submitted in the proceeding to which this review extends. It was exhibit A to the affidavit of W. D. Lambrecht filed on or about February 13, 1958 in support of SD&AE's motion for summary judgment in *Gunther I*, Action No. 2080 SD W.¹³ It was referred to in the

¹¹Note 7, *supra*.

¹²This document was exhibit A to the affidavit of K. K. Schomp filed in opposition to petitioner's Rule 60 (b) motion. The parties have stipulated that it need not be printed and is to be treated as a documentary exhibit. It is attached to page 266 of the original record transmitted to this Court.

¹³*Gunther v. San Diego & Arizona Eastern Railway* (DC SD Calif., 1958) 161 F. Supp. 295.

affidavit of Charles W. Decker filed in support of petitioner's Rule 60 (b) motion (R 145).)

Since August 22, 1947 Mr. J. P. Colyar has been Chairman, General Committee of Adjustment, Brotherhood of Locomotive Engineers, for the Southern Pacific Company (Pacific Lines), the former El Paso & Southwestern System, the Northwestern Pacific Railroad Company, the San Diego & Arizona Eastern Railway Company, and the Southern Pacific Railway Company of Mexico (R 105-106). He stated, with respect to the printing of agreements—

“It is not customary in the railroad industry to print a new booklet each time the contracting parties agree to some modification to the existing agreement whether such modification is in the form of elimination of an existing provision, change in an existing provision, or addition of a new provision. Instead, such modifications are evidenced by exchanges of correspondence between the contracting parties and other such written memoranda.” (R 107)

An example of the procedure followed in order “to bring it (the printed document) up to date” (R 195) is exhibit H to the supplemental affidavit of K. K. Schomp (R 194-203).

A procedure other than that of serving notice of desired changes pursuant to Section 6 of the Railway Labor Act, or of bringing the printed agreement up to date, which led to modification of the existing agreement is evidenced by exhibits K and L to Mr. Colyar's affidavit (R 128-133). It appears therefrom, and is

conceded by SD&AE in the affidavits of C. M. Buckley (R 171) and K. K. Schomp (R 171), that the SP-BLE agreement was modified in 1947 as a result of conferences held in connection with the claim of Engineer C. O. Calloway "for compensation for time lost owing to his having been required by the Company to report to the General Hospital for physical examination." (R 155) According to Mr. Buckley—

"During said discussions the question of restricting of an engineer's seniority owing to his removal from his position account of his physical condition not meeting prescribed physical standards arose and was eventually disposed of by our agreement during conference with Brotherhood of Locomotive Engineers representatives, that in such cases in the future a three doctor panel would be provided in event an engineer desired the question of his physical ability to conform to prescribed physical standards to be determined." (R 156)

Mr. Colyar stated that this SP-BLE agreement for independent appraisal of physical fitness became a part of the SD&AE-BLE agreement on November 13, 1947 by reason of a prior SD&AE-BLE agreement to apply interpretations made on provisions of the SP-BLE agreement to similarly worded provisions of the SD&AE-BLE agreement, and that it remained a part thereof as of December 30, 1954 (R 109).

When petitioner reached his 70th birthday in 1953 SD&AE required him to take and pass a physical examination every three months (R 40). This "rule", although "not a part of the collective bargaining

agreement"¹⁴ (R 41) was complied with by petitioner. He reported for examination on November 24, 1953, and at each successive ninety day interval until December 15, ~~1953~~¹⁹⁵⁴ (R 14-15). Findings of SD&AE physicians made on that date were reviewed by its Chief Surgeon at the Southern Pacific Hospital in San Francisco "who concurred in the findings and opinion that Mr. Gunther's heart was in such condition that he would be likely to suffer an acute coronary episode" (R 15). Accordingly, on December 30, 1954, SD&AE removed petitioner from active service as a locomotive engineer (R 33).

The steps taken by petitioner in exhaustion of his administrative remedy were found by the Board to be as follows:

"Findings:

* * *

"Claim of engineer for reinstatement in service and pay for time lost. Shortly after his 71st birthday claimant was disqualified from service by the chief surgeon on the basis of a physical examination by a company physician at Los Angeles. Upon his request he was then sent to the Southern Pacific General Hospital at San Francisco and there examined by carrier's medical superintendent following which the chief surgeon determined that he should not be returned to service.

¹⁴The sole reference in the green booklet to physical examinations or standards of physical fitness is a provision at page 65 thereof conferring upon engineers disabled by loss of one eye the privilege of displacing any engineer his junior in branch service—a fact which influenced the District Court's characterization of the green booklet as a "bare-bone agreement." (R 65)

"Thereupon claimant went for examination to a recognized specialist at San Diego and on the basis of his report requested that a three doctor board be appointed to reexamine his physical qualification for return to service.

"Upon denial of this request claim for reinstatement and back pay was filed in this Division resulting in Award 17 161 in which the claim was dismissed without prejudice on the ground that there was no showing whether or not claimant's physician and the company physicians disagreed as to claimant's physical qualifications. Now the claim has been progressed again with the inclusion of further statement by claimant's physician." (Findings, Award and Order, October 2, 1956, R 5-6)

The result of the Board proceeding in which the above findings were made was an award providing for a neutral panel of physicians to examine petitioner and report their findings, and an order to the parties to make the award effective (R 5-8). This award was based on the following findings of the Board as to the underlying rights and duties of the parties and its power to implement same.

"Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appointment of a neutral medical board as here sought and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.

"It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employees to remain in

service. It is true also that the employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service.

"If carrier through its medical staff has removed an employe from service in good faith, on the basis of a fair standard of fitness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

"Since determination of the facts necessary to enable the Division to make proper award on such issue requires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians.

"While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians.

"If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians." (Findings, Award and Order, October 2, 1956, R 6-7).

The events which followed are set forth in the Board's Interpretation (which included a finding that "the statements set out in claimant's submission are true" (R 10)), Award and Order of October 8, 1958.

"INTERPRETATION

"This docket presents claim previously before this Division with the present Referee sitting as a Member, which resulted in Award 17 646. As appears therein claimant had been held by carrier's chief surgeon to be no longer physically qualified to remain in service and the Division determined that there was sufficient disagreement as to claimant's physical condition to justify inquiry and finding by a board of three physicians, as not unusually required. It was declared that if the decision of the majority of such board should support the decision of carrier's chief surgeon the claim would be denied; if not, it would be sustained with pay pursuant to rule on the property, from October 15, 1955.

"On June 30, 1958 claimant filed with the Division a supplemental submission setting out that following said award a board of three physicians had been agreed on and established as provided

for therein, and that the findings and decision of the majority of said board did not support the decision of carrier's chief surgeon but found that claimant had no physical defect which would prevent him from carrying on his usual occupation, but that carrier advised claimant that 'the findings of the three doctor board have been reviewed by the chief surgeon and interpreted to be such that you should not be returned to duty', and refused to reinstate claimant or pay him for time lost. Wherefore claimant sought a new or supplemental award or an interpretation, to make absolute his right to reinstatement and pay for time lost.

"Carrier now requests permission to file an answer to petitioner's submission and asserts that the Referee has authority to resolve any question of procedure in the matter before him. Claimant's submission was filed more than ninety days before the request without any request appearing for extension of time. In the meantime the Division deadlocked on the disposition of the dispute and it was submitted to the National Mediation Board which appointed a Referee; then the docket was given the Referee for study and thereafter on the day the matter came on for oral argument carrier made its request for permission to file answer. Even then no answer was tendered or time suggested when one might be prepared. In such situation, if the Referee has such authority as urged by carrier representatives permission would be denied." (Interpretation, Award and Order, October 8, 1958, R 9-11)

During the period October 2, 1956 to October 8, 1958 petitioner made his first attempt to secure the

relief afforded by Section 3, First (p) of the Railway Labor Act. His petition was dismissed as a result of SD&AE's motion for summary judgment and the District Court's view that the award of October 2, 1956 was of insufficient finality to support an enforcement suit (R 24-28).¹⁵

Following the "absolute and final" (R 10) award of October 8, 1958, petitioner, on March 21, 1960, authorized Mr. Colyar to prosecute his claim for enforcement of said award, as interpreted, with SD&AE (R 169). On April 6, 1960, SD&AE's manager of personnel, Mr. Schomp, responding to Mr. Colyar's letter of March 29, 1960 communicated SD&AE's refusal to comply with same (R 169-170).

In the petition by which, on September 26, 1960, this proceeding was initiated, petitioner simply alleged that, as of December 30, 1954, his "employment with defendant was governed by the terms of the Agreement by and between the San Diego and Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers." (R 2) Further, he alleged that said agreement did "not require employees covered by same to retire from active service at any stated age limit" and that "by the terms of the agreement . . . petitioner had seniority rights which entitled him to continue in the active service of defendant as a locomotive engineer." (R 2) With respect to the physical disqualification, he alleged that it constituted "in fact, imposition upon petitioner of compulsory retirement

¹⁵Note 13, *supra*.

in violation of petitioner's rights under the agreement" in that "at said time petitioner's physical and mental fitness was comparable to that of men much younger than he and he was qualified physically to perform the duties which would be required of its locomotive engineers." (R 2) He then set forth the facts relating to his resort to the Board and incorporated the results thereof, the award, as interpreted, by attaching copies thereof to his petition (R 5-11). He prayed for an order enforcing same (R 4).

SD&AE promptly moved for summary judgment, the third ground of same being that the order sought to be enforced was *ultra vires*, and therefore unenforceable, because, in requiring the establishment of a three physician panel to determine petitioner's right to continue in service, and in relying on the findings of said panel as the basis for sustaining petitioner's claim, the Board had exceeded its power to interpret and apply existing agreements and had, in effect, imposed upon SD&AE a duty for which it had never bargained (R 29).

This first motion was denied without prejudice to its renewal on said third ground (R 22) for reasons as stated in the opinion of the Court which accompanied the order of denial (R 30).

SD&AE then filed its answer and, simultaneously moved for summary judgment a second time, confining said motion to the third ground described above.

In its answer, SD&AE admitted that petitioner's employment with defendant "was subject to the terms of a collective bargaining agreement by and between

the San Diego and Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers, and that there was no provision in said agreement relating to the age at which employees covered thereby should retire from active service;" and admitted that it removed appellant from active service on December 30, 1954; but denied that he had rights to continue in active service or that appellant was, at that time, qualified physically to continue in active service (R 33).

The pertinent allegations of the affidavits filed in support of, and in opposition to, the second motion for summary judgment were the following:

1. In December, 1954, "... the applicable written agreement was a green-colored booklet dated March 1, 1935." (Supporting affidavit of K. K. Schomp, R 40)
2. "On December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform services." (Supporting affidavit of K. K. Schomp, R 40)
3. There were "rules", some, but not all, of which were contained in the company's "Rules and Regulations of the Transportation Department"¹⁶ which

¹⁶The booklet "Rules and Regulations of the Transportation Department" is Exhibit B to Mr. Schomp's affidavit (R 43). The parties have stipulated that it need not be printed and may be treated as a documentary exhibit. It is found at page 72½ of the record transmitted to this Court.

"must be complied with by the employees and are not a part of the collective bargaining agreement." (Supporting affidavit of K. K. Schomp, R 41)

4. "Prior to and since December 30, 1954," the green colored booklet "has been the contract governing the employment of Mr. Gunther." (Supporting affidavit of K. K. Schomp, R 41)

5. The "contract (the green booklet) contained no provision creating a three-doctor panel to review the physical condition of a locomotive engineer who has been removed from his position or restricted from performing service" until December 1, 1959, when, as a result of a demand made upon respondent by Mr. J. P. Colyar, General Chairman of the BLE, such a provision became effective by means of an "amending agreement." (Supporting affidavit of K. K. Schomp, R 41-42)

6. Petitioner, as General Chairman of the BLF&E, nonetheless was "for many years actively engaged in enforcing the provisions of the Agreement referred to in his petition" and "thoroughly familiar with said Agreement and its interpretation and application by the parties thereto in the operations of defendant." (Opposing affidavit of F. J. Gunther, R 52)

7. Said agreement adopts the principle of seniority and provides:

"Article 35—Seniority

"Section 1

"Rights of engineers shall be governed by seniority in service of the Company as engineers and

seniority of the engineer as herein defined shall date from first service as an engineer.

"Section 3 (b)

"Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment." (Opposing affidavit of F. J. Gunther, R 52-53)

8. Said agreement also adopts the principle of discharge only for good cause and states:

"Article 47—Investigations

"Section 1 (b)

"No engineer shall be suspended or discharged, except in serious cases, where a fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials.

"Section 1 (e)

"If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid rate as set forth in Appendix 'B' for time lost on such account." (Opposing affidavit of F. J. Gunther, R 53)

9. That, with respect to reduction in force, said agreement provided:

"Article 38—Reduction of force

"Section 1 (a)

"When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off may, if they so elect,

displace any fireman their junior under the following conditions:

* * * * *

“Second: That when reductions are made they shall be in reverse order of seniority.” (Opposing affidavit of F. J. Gunther, R 53)

10. That the foregoing provisions were “vague, ambiguous and insufficiently certain to specify, in and of themselves, the precise rights of the employees covered thereby with respect to duration of employment and the rights, if any, of the employer to restrict same.” (Opposing affidavit of F. J. Gunther, R 53)

11. “That at all times pertinent herein the interpretation of said provisions, and their application to defendant’s operations, were done by reference to a long history of custom and practice in the railroad industry; that, for example, because the ‘... (R)ights of engineers ... governed by seniority in the service of the Company ...’ were not specified in detail in said Agreement, their substance could only be, and was, determined by resort to custom and practice in the industry.” (Opposing affidavit of F. J. Gunther, R 54)

12. “That at all times pertinent herein it was the custom and practice for engineers covered by said Agreement to bid for and retain assignments to active duty on the basis of seniority; that, therefore, the most senior engineer was entitled to the assignment of his preference and, in the event of elimination of such assignment by reduction of work force or other-

wise, such senior engineer had the right to displace a junior and thus continue in active employment; that defendant's removal of petitioner from the assignment of his choice on December 30, 1954 was in violation of petitioner's seniority rights as conferred by said Agreement because, at said time, petitioner was senior to the engineer who replaced him on said assignment and, for that matter, to all other engineers in the employ of defendant." (Opposing affidavit of F. J. Gunther, R 54)

13. "That at all said times it was never the custom and practice for the active employment of an engineer covered by said agreement to be terminated by retirement against the will of such engineer." (Opposing affidavit of F. J. Gunther, R 54)

The District Court found the "collective bargaining agreement between plaintiff and defendant's Union, *Brotherhood of Locomotive Engineers*"¹⁷ to be the green booklet. (Finding of Fact 4, R 94) It held that the provisions according seniority rights and protection against discharge except for good cause cannot, as a matter of law, be deemed to restrict the "residual right" of respondent carrier to remove its engineer employees from active service upon an ex-parte determination of physical unfitness. (R 71-72) It was the Court's view that, because the green booklet is silent thereon, the carrier retained—had not "surren-

¹⁷The District Court, obviously, intended this finding to read "between defendant and plaintiff's union." But the error of ascribing to Mr. Gunther membership in the BLE was not inadvertent. As late as the argument on the Rule 60(b) motion, the District Court was still referring to the BLE as "petitioner's union".

dered" said right (R 77). Despite the "bare bone" aspect of the green booklet the Court had "no difficulty" in interpreting its provisions as to seniority (R 67, 71). The Court was not impressed with petitioner's contention that, since the terms of the agreement relating to the rights of engineers to remain in active service, whether by reason of seniority rights, right to continue in service in absence of good cause for discharge, or otherwise, were far from clear, and since the circumstances, scope and bounds thereof were to be found "by reference to a long history of custom and practice in the railroad industry," petitioner should not be precluded from his opportunity to present evidence, extrinsic to the green booklet, at a trial upon the merits (R 71).

Finding, then, no limitation in the green booklet upon the carrier's residual right to disqualify its locomotive engineers from active service upon an ex-parte determination of physical unfitness, the Court held that the action of the Board in requiring the establishment of a three physician panel to be in excess of its jurisdiction to "interpret and apply" existing agreements.¹⁸ Having thus concluded the award and order sought to be enforced was, in its view, a nullity, the Court granted summary judgment because "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." (R 79)

¹⁸"The Board should have interpreted the Agreement as we have done here, and should have dismissed the claim prior to making its first, or conditional award." (Opinion of Sept. 26, 1961, R 78)

Following the docketing of the appeal from the summary judgment, on or about Feb. 28, 1962, petitioner's attorney attended a conference at the office of J. P. Colyar, Chairman of the General Committee of Adjustment, BLE. At said conference said attorney learned, for the first time,¹⁹ the following:

1. That effective January 1, 1945, as a result of an exchange of correspondence²⁰ between SD&AE and the BLE, acting for the engineer employees of SD&AE, the carrier agreed to apply "interpretations made on articles in Pacific Lines Engineers' Agreement that are similarly worded in SD&AE Engineers' Agreement to SD&AE Engineers' Agreement."²¹

2. Also, as a result of said exchange of correspondence, a new provision, Article 9, Section 1 (c), identical to Article 12, Section 1 (c) of the Pacific Lines-BLE Agreement, was added to the SD&AE-BLE Agreement. Thus, as of January 1, 1945 the Pacific Lines-BLE Agreement and the SD&AE-BLE Agreement contained the identical provision:

"Engineers assigned to regular runs, who through no fault of their own are not used thereon and their runs are worked in whole or in part, will be allowed the full mileage of their assignments."²²

¹⁹The affidavit of Charles W. Decker, filed in support of petitioner's Rule 60 (b) motion, explains in some detail how he continued under the misapprehension that the green booklet was the entire written agreement until his conference with Mr. Colyar (R 142-153).

²⁰Exhibits A through J to Mr. Colyar's affidavit filed in support of petitioner's Rule 60 (b) motion (R 111-127).

²¹Exhibit H, Colyar affidavit (R 125).

²²Colyar affidavit (R 108).

3. Effective October 2 or November 13, 1947, as a result of the adjustment of a grievance arising out of the claim of one C. O. Callaway, and memorialized in letters over the signatures of the Assistant General Manager and the Assistant Manager of Personnel of the Southern Pacific Company addressed to BLE officials, agreement was reached with respect to application of Article 12, Section 1(c) of the Pacific Lines-BLE Agreement as follows:

"We further advised you, with the understanding that it is the Company's responsibility to prescribe physical standards required of employees to qualify them for service and to remain in service, that we were agreeable in any case where an engineer was removed from his position on account of his physical condition and he desires the question of his physical ability to conform to prescribed physical standards to be determined, the management was agreeable to setting up a special panel of doctors consisting of one doctor selected by the Company, one doctor selected by the employee or his representative, the two doctors thus selected to confer and appoint a third doctor specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering. The management and the engineer will each defray the expenses of their respective appointee, and will each pay one-half of the fee and traveling expenses of the third appointee. This panel of doctors upon completing their examination will make a full report in duplicate, one copy each to be sent to the General Manager and the engineer. At the time of making the report a bill for the fee and traveling expenses,

if there be any, of the third appointee shall be made in duplicate, one copy to be sent to the General Manager and one copy to the engineer."²³

According to the affidavit of Mr. Colyar, this constituted an "interpretation" upon said Article 12, Section 1(c) (R 109).

4. That it was Mr. Colyar's opinion that, because of the foregoing, as of no later than November 13, 1947 and to and including December 30, 1954, the Agreement between the SD&AE and its engineers as represented by the BLE contained a provision specifically providing for resort to a three physician panel to determine an engineer employee's physical fitness to continue in active service (R 109-110), and

5. That the subsequent demand²⁴ by Mr. Colyar under date of August 28, 1959 for a new Section 3(a) of Article 68 of the SD&AE-BLE Agreement relating to a three physician panel for determining the physical fitness of engineer employees to continue in active service was not for the purpose of creating a new contractual right but "to clarify and make more explicit the existing provision" for such right.²⁵

Upon learning the foregoing, petitioner secured an order from the District Court indicating its intention to entertain his motion to be relieved from the operation of the summary judgment (R 206-207) and thereby secured an order of the Court of Appeals re-

²³Exhibits K and L, Colyar affidavit (R 128-133).

²⁴Exhibit M, Colyar affidavit (R 134); Exhibit B, Schomp affidavit (R 20); Exhibit C, Schomp affidavit (R 43).

²⁵Colyar affidavit (R 110).

manding the record. Petitioner's Rule 60(b) motion for relief from the operation of the summary judgment was heard on affidavits which included averments as to the facts set forth above and, additionally, averments of petitioner explaining the circumstances which prevented him from knowing about the provisions for the three-physician panel as created by the correspondence between the carrier and officials of the BLE. In his affidavit petitioner emphasized that at no time was he a member of the BLE; that he did not have access to the correspondence which resulted in the establishment of the three-physician panel provision; that his knowledge of the SD&AE-BLE Agreement was limited to the contents of the green booklet; and that he did not know of the correspondence establishing the three doctor panel method of resolving dispute as to physical fitness until he read Mr. Colyar's affidavit.²⁶

On April 10, 1963, the District Court made its order denying said motion (R 218-219). In its opinion which accompanied said order the Court expressed the view that petitioner's failure to discover the correspondence in question was not justified; that "recourse to statements in affidavits filed by defendant is not necessary for us to see that petitioner has not produced and would not be able to produce at trial any evidence which could lead to a determination in his favor." (R 214) The Court reported that it could "find nothing in the affidavits filed by petitioner or the exhibits attached to such affidavit, nor in any material

²⁶Gunther affidavit (R 139-141).

presented by petitioner, to show that a three-physician panel was ever applicable prior to 1959, to engineers on the San Diego and Arizona Eastern Railroad." (R 215)

SUMMARY OF ARGUMENT

Despite the mandate of the Railway Labor Act—that "on the trial of such suit [an action to enforce an award and order of the National Railroad Adjustment Board] the findings and order of the . . . Board shall be prima facie evidence of the facts therein stated" (45 USC § 153, First (p))—the Court of Appeals has affirmed a District Court judgment, *entered upon the carrier's motion for summary judgment*, setting aside such an award.

The award which petitioner requested the District Court to enforce incorporated the Board's finding that when the carrier's right to determine the physical fitness of its employees to perform their assignments collides with the employee's "right to priority in service according to seniority and pursuant to the agreement so long as he is physically qualified" (R 6); the Board "has jurisdiction to determine whether the employee has wrongfully been deprived of service" (R 6) by resort to the findings of a "neutral board of three qualified physicians." (R 6)

The rationale of the decisions below is that, because the most recently printed "agreement" (a document setting forth a collective agreement *executed on November 30, 1938*), as interpreted by the District Court

and the Court of Appeals, contains no language limiting the "residual" or "reserved" right of the carrier to determine the physical fitness of its locomotive engineers, the Board's award, based on a contrary interpretation, is *ultra vires* and hence unenforceable.

This summary rejection of the Board's determination of the underlying rights and duties of the parties, and of petitioner's suit, contravenes the applicable law.

Summary judgment may not be granted if the record discloses a triable issue of fact. Rule 56, Rules of Civil Procedure. Rights and duties arising out of collective bargaining conducted pursuant to our national labor laws are not restricted to those unambiguously expressed in the most recently printed document purporting to be the collective agreement. *John Wiley & Sons v. Livingston*, 376 US 543, 550. Collective agreements are not the simple product of a consensual relationship. Their construction is not governed by common law principles. The rights and duties which they reflect are to be ascertained by reference to the common law of the industry. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 US 574, 578. These rules of federal law, fashioned "from the policy of our national labor laws" (*Textile Workers Union v. Lincoln Mills*, 353 US 448, 456), apply to this action for enforcement of a Board award. *International Ass'n of Mach. v. Central Airlines*, 372 US 682, 691; *Republic Steel Corp. v. Maddox*, _____ US _____, 13 L ed 580, 585, 85 S Ct 614, 617-618.

The Board's function—to hear and determine disputes “growing out of grievances or out of the interpretation and application of agreements concerning rates of pay, rules or working conditions” (45 USC § 153, First (i))—must be deemed to include the power to determine what are the rights and duties which arise out of the collective bargaining and dispute-adjusting process structured by the Railway Labor Act. Railroad workers now may be enjoined from resorting to concerted economic action to remedy a grievance cognizable by the Board, or to enforce compliance with an award of the Board. *Brotherhood of R.R. Trainmen v. Chicago, R. & I. R. Co.*, 353 US 30; *Brotherhood of Locomotive Engineers v. Louisville & N. R. Co.*, 373 US 33. Thus, their only means of implementing rights arising under the Railway Labor Act, and the negotiations which it enjoins upon carriers and their employees, is resort to the Board and, if the carrier refuses to comply with the Board's award, to the federal district courts.

This lends to Board findings as to the nature of such rights substance at least the equivalent of those of arbitration tribunals established pursuant to the collective bargaining process structured by the Labor Management Relations Act, and precludes their rejection by the enforcing court on the basis of that court's contrary interpretation of the applicable agreement. *United Steelworkers v. Enterprise W. & C. Corp.*, 363 US 593, 597. Certainly it precludes their rejection on proceedings for summary judgment which necessarily deprives the employee of the “trial de novo” provided for by the Act.

ARGUMENT**I****FACTUAL SUMMARY.**

On October 2, ¹⁹⁵⁶~~1958~~ the First Division of the National Railroad Adjustment Board, pursuant to petitioner's submission, issued an award, the findings portion of which included—

“Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appointment of a neutral medical board as here sought and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.

“It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employes to remain in service. It is true also that the employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service.

“If carrier through its medical staff has removed an employe from service in good faith, on the basis of a fair standard of fitness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

“Since determination of the facts necessary to enable the Division to make proper award on such issue requires expert medical competence, it has

not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by carrier and one by the employee and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians." (R 6-7.)

Pursuant to this finding it made its award whereby petitioner's claim for reinstatement to active service, with back pay, was to depend upon the findings of a neutral board of physicians to be selected by the parties (R 7).

The parties complied with the Board's order to make the award effective and the majority of the board of physicians found that petitioner had no physical defect which would prevent him from carrying on his usual occupation, but the carrier advised petitioner that "the findings of the three doctor board have been reviewed by the chief surgeon and interpreted to be such that you should not be returned to duty." (R 9-10.)

Whereupon, petitioner re-submitted his claim to the Board and on October 8, 1958, the Board, finding the foregoing to be true, issued its award and order to the carrier to reinstate petitioner to active service with pay for time lost (R 11).

Petitioner incorporated the findings, award and order of October 2, 1956 and the interpretation, award

and order of October 8, 1958 into his petition to the District Court for an order enforcing same pursuant to Section 3, First (p) of the Railway Labor Act (45 USC § 153, First (p)). (R 3.) He alleged that by the terms of the applicable collective bargaining agreement he had seniority rights which entitled him to continue in the active service of the carrier as a locomotive engineer (R 2); that at the time of his removal from service on December 30, 1954 he was qualified physically to perform the duties which the carrier required of its locomotive engineers (R 2); and that said removal was, in fact, imposition upon him of compulsory retirement in violation of his rights under said agreement (R 2).

On the carrier's motion for summary judgment a printed booklet purporting to constitute the applicable collective bargaining agreement executed on November 30, 1938 was submitted to the District Court and alleged by the carrier to be the applicable collective bargaining agreement as of the date it removed petitioner from active service, December 30, 1954 (R 14, 40). Petitioner alleged, in opposition to the motion, that the terms of that agreement were ambiguous and that the terms of his employment with the carrier were not only to be found in said booklet but also by resort to custom and practice in the industry (R 54).

The District Court considered the 1956 award, as interpreted by that dated October 8, 1958, to constitute a single award "taking effect with the issuance of the second". (R 58.) Restricting its search for the underlying rights and duties of the parties to the

booklet referred to above, it found no provision limiting the carrier's "residual right" (R 71) to determine the physical fitness of its employees (R 71, 77, 96). It did not interpret the seniority provisions of the booklet, or those protecting locomotive engineers against discharge except for cause, to limit said "residual right" in any way (R 71). It did not consider that any ambiguity existed permitting resort to evidence extrinsic to the booklet to ascertain petitioner's rights or the carrier's duties (R 71). It deemed the Board's jurisdiction to extend only to the interpretation and application of existing agreements (R 63, 78-79). Hence it entered summary judgment setting aside the award and order of reinstatement with back pay and entered judgment for the carrier (R 97).

When petitioner presented to the District Court, on his Rule 60 (b) motion for relief from said judgment, conclusive proof that, in the railroad industry contractual rights and duties are evidenced by materials extrinsic to the most recently printed "agreement", the District Court "found nothing in the record to justify petitioner's failure to discover and present to the Court prior to the rendition of judgment the evidence he now proffers." (R 34.) And it ruled that, in any event, "(R)ecourse to statements in affidavits filed by the defendant is not required for us to see that petitioner has not produced and would not be able to produce at trial, any evidence which could lead to a determination in his favor." (R 214.)

The Court of Appeals affirmed the summary judgment because it found no dispute growing out of a

grievance or contract interpretation to be presented by petitioner's removal from active service on the ground of physical unfitness (R 230, 235). It affirmed the order denying petitioner's Rule 60 (b) motion because it was unwilling to excuse petitioner's "failure to search or inquire" for the proof presented in support thereof during the pendency of the second motion for summary judgment (R 234).

II

THE RIGHTS AND DUTIES OF RAILROAD EMPLOYERS AND EMPLOYEES ARISING OUT OF THE COLLECTIVE BARGAINING PROCESS ARE NOT RESTRICTED TO THOSE EXPRESSLY AND UNAMBIGUOUSLY STATED IN THE MOST RECENTLY PRINTED DOCUMENT PURPORTING TO BE THE AGREEMENT. THE DECISIONS BELOW ARE IN CONFLICT WITH THE GROWING BODY OF FEDERAL SUBSTANTIVE LAW APPLICABLE IN SUITS TO ENFORCE RIGHTS ARISING OUT OF THE RAILWAY LABOR ACT AND COLLECTIVE BARGAINING CONDUCTED PURSUANT THERETO.

It is respectfully submitted that recent decisions of this Court, commencing with *Textile Workers Union v. Lincoln Mills*, 353 US 448, have established rules of law which, applied to the facts of this case, require reversal of the adverse judgments below and remand of this cause to the District Court for the trial "de novo" provided by Section 3, First (p) of the Railway Labor Act (45 USC § 153, First (p)).

At issue is the effect in the civil suit referred to in said statute of the Board's findings as to the underlying rights and duties of railroad carriers and em-

ployees resulting from the collective bargaining and dispute-adjusting process structured by the Railway Labor Act.

The Act confers jurisdiction upon the Board to hear and determine petitions for resolution of "disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . ." (45 USC § 153, First (i), emphasis added.) "(A)wards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award." (45 U.S.C. § 153, First (m).) "In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award before a day named." (45 USC § 153, First (o).)

Also, the Act confers jurisdiction upon federal district courts to entertain petitions for an order enforcing such awards.

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth the causes for which he claims relief, and the order of the division of the

Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board *shall be prima facie evidence of the facts therein stated*, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (45 USC § 153, First (p), emphasis added.)

It was not until this Court decided *Brotherhood of Locomotive Engineers v. Louisville & N. R. Co.*, 373 US 33, that it was clear that the Norris-LaGuardia Act did not prohibit the enjoining of strikes threatened to enforce such awards. The availability of such threat to the organizations of railroad employees prior to said decision may explain the remarkably low incidence of Section 3, First (p) enforcement suits.

In any event, there is a paucity of case authority on the subject. There remains indecision, for example, as to whether *Brotherhood of Locomotive Engineers*

v. Louisville & N. R. Co., supra, established that non-money awards, as well as money awards, are subject to review in the "de novo" action. (Compare *Brotherhood of Railroad Trainmen v. Louisville & N. R. Co.* (CA 5, 1964) 334 F. 2d 79 and *Russ v. Southern Railway Company* (CA 6, 1964) 334 F. 2d 224, 227.)

Judicial reception to Board awards has not been consistent. In *Washington Terminals Co. v. Boswell* (CA DC, 1941) 124 F. 2d 235, affirmed by an equally divided Court, 319 US 732, the method of review afforded by Section 3, First (p) of the Act was held to be exclusive. The language of the statute conferring prima facie evidentiary value to the Board's findings was explained as follows:

"The statute also relieves the employee of another burden. It provides that the enforcement suit 'shall proceed in all respects as other civil suits, except' that on the trial * * * the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated.' 45 U.S.C.A. §153, First (p). The burden of proof, in making a prima facie case, may be financial as well as procedural, and it may be heavy. The statute relieves the employee of this, at least to some extent, when he introduces the findings and order in evidence. Though they may not make his case finally, they so so initially. They also bring to the court the weight of decision on facts and law by men experienced in contracts, disputes and proceedings of this special and complicated character. The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed

upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative not merely presumptive in value, having effect fairly comparable to that of expert testimony." (124 F. 2d 124, 141.)

Subsequently, in *Elgin J. & R. Co. v. Burley*, 327 US 661, this Court confirmed the probative value of the Board's findings with the following language:

"Moreover, when an award of the Adjustment Board involving an employee's individual grievance is challenged in the courts, one who would upset it carries the burden of showing that it was wrong. Its action in adjusting an individual employee's grievance at the instance of the collective bargaining agent is entitled to presumptive weight. For, in the first place, there can be no presumption either that the union submitting the dispute would undertake to usurp the aggrieved employee's right to participate in the proceedings by other representation of his own choice, or that

the Board knowingly would act in disregard or violation of that right. Its duty, and the union's, are to the contrary under the Act.

Furthermore, the Board is acquainted with established procedures, customs and usages in the railway labor world. It is the specialized agency selected to adjust these controversies. Its expertise is adapted not only to interpreting a collective bargaining agreement, but also to ascertaining the scope of the collective agent's authority beyond what the Act itself confers, in view of the extent to which this also may be affected by custom and usage." (327 US 661, 664-665.)

Despite the tone of judicial deference sounded in *Washington Terminals* and *Elgin*, civil suits to enforce Board orders did not fare well. Some were rejected on the ground that the award and order sought to be enforced was too vague, or of insufficient finality. *Railroad Yardmasters of N. A., Inc. v. Indiana H. B. R. Co.* (CA 7, 1948) 166 F. 2d 326; *System Federation etc. v. Louisiana & A. R. Co.* (CA 5, 1941) 119 F. 2d 509; *Smith v. Louisville & N. R. Co.* (SD Ala., 1953) 112 F. Supp. 388. This was the fate of petitioner's first enforcement suit which he filed to enforce the award of October 2, 1956. *Gunther v. San Diego & Arizona Eastern Ry. Co.* (SD Calif., 1958) 161 F. Supp. 295.

Other courts were more receptive. Thus, in *Kirby v. Pennsylvania R. Co.* (CA 3, 1951) 188 F. 2d 793, the district court's dismissal of an enforcement suit on the ground that it was too vague was reversed. The court of appeals said—

"So we have this situation. The Congress has provided for the submission of certain railway labor disputes to a body which over the years has established its own method of operation in a way which gives each side a chance to have its problems heard and decided by persons who are thoroughly familiar with the industry and the kind of questions presented. The law making body has thought well enough of the type of operation to provide for the enforcement of its results where necessary. But it has protected the party who lost before the Board from having unfair advantage taken of him by making the findings of the Board *prima facie* only. The loser must go forward with attacking proof; but the facts are not conclusively established by the findings. We think under these circumstances to insist upon the kind of definite requirement of findings of fact to which we are accustomed in the ordinary non-jury case would be doctrinaire and unrealistic. We think courts should take the findings of these divisions of the Railroad Adjustment Board as they come and do what they can with them." (188 F. 2d 793, 796.)

And, in *Hodges v. Atlantic Coast R. Co.* (CA 5, 1962) 310 F. 2d 438 the district court's dismissal of a petition to enforce an award which, "in effect, ordered a medical compulsory arbitration" (310 F. 2d 438, 441) as being "too vague to be final and enforceable." (310 F. 2d 438, 440) was reversed. The court of appeals said—

"Thus we think that there was an award of sufficient definiteness to invoke the aid of the District Court in its enforcement. The Court was

therefore in error in having dismissed it outright. And to this extent we reject the cases urged by the Carrier and accepted as authoritative by the District Court. *Smith v. Louisville & Nashville R. R.*, D. C. Ala., 1953, 112 F. Supp. 388; *Gunther v. San Diego & Arizona Eastern Ry.*, S. D. Calif., 1958, 161 F. Supp. 295; 1961, 192 F. Supp. 882; 1961, 198 F. Supp. 402. The Court on remand should therefore enter appropriate orders to effectuate the medical examinations for use by the Adjustment Board." (310 F. 2d 438, 443.)

(See also *Hanson v. Chesapeake & O. R. Co.* (DC SD W. Va., 1961) 198 F. Supp. 325.)

(The events subsequent to the court of appeals' reversal in the *Hodges* case are reported in *Hodges v. Atlantic Coast R. Co.* (DC ND Ga., 1964) 238 F. Supp. 425.)

Another line of authority is that which refuses enforcement to awards which are found by the court to be predicated upon a non-existent duty. The Board's jurisdiction, it is said, is confined to the interpretation and application of existing agreements. Ergo, if the court deems the award sought to be enforced to have no predicate in the collective bargaining agreement, the award is set aside as *ultra vires*, because the court's determination as to what is the applicable agreement, or its interpretation of same, differs from that of the Board.

This is essentially what has happened in the case at bench. The Court of Appeals cited no authority for its rejection of the Board's finding that petitioner's

seniority rights, in conflict with the carrier's right to determine the physical fitness of its employees, limit the latter right to the extent that the petitioner is entitled to independent appraisal of his physical fitness. It is clear, however, that its conclusion that the Board had exceeded its jurisdiction is based upon its reading of the 1938 booklet and determining therefrom, contrary to the Board's finding, that "there was no contrary provision (to the carrier's 'reserved right' (R 230) to determine the physical fitness of its employees) in the contract between the Railroad and the Brotherhood of Locomotive Engineers as of the date of appellant's removal." (R 231.)

The District Court documented its summary rejection of petitioner's suit on the ground that the Board had exceeded its jurisdiction by citing *Southern Pacific Co. v. Joint Council Dining Car Employees* (CA 9, 1947) 165 F. 2d 26 and *Thomas v. New York C. & St. L. R. Co.* (CA 6, 1950) 185 F. 2d 614.

The *ultra vires* doctrine has its inception in a dictum in *Hunter v. Atchison, T. & S. F. R. Co.* (CA 7, 1948) 171 F. 2d 594, a suit by a group of train porters to enjoin the implementation of an award issued in a proceeding to which they were not a party. In affirming the grant of injunctive relief the court of appeals said—

" * * * In reality what the Board did was not merely to exercise its statutory authority to interpret and apply the contract as it existed but to make a new and different contract between the brakemen and the carrier.

" * * *

"While we are of the view that the Award is void because the Board exceeded its authority, we place our decision primarily upon the ground that it was made without notice to the porters, as the statute requires, and that their constitutional right to a hearing was denied." (171 F. 2d 594, 599.)

The dictum was repeated in *Thomas*, supra, and in *Shipley v. Pittsburgh & L. R. Co.* (WD Pa., 1949) 83 F. Supp. 722. However, our research indicates that only in the decisions discussed below and the recently decided *Hanson v. Chesapeake & O. R. Co.* (SD W. Va., 1964) 236 F. Supp. 56 has it been the ground for summary dismissal of a subsection First (p) enforcement suit.

Limitation of the Board's jurisdiction to the interpretation and application of existing agreements appears highly questionable in view of the language of the statute which confers jurisdiction to hear petitions for the resolution of disputes "growing out of grievances or out of the interpretation or application of agreements" (45 USC § 153, First (i)) This dual jurisdiction was noted in *Thomas v. New York C. & St. L. R. Co.*, supra, 185 F. 2d 614. The court there considered that the Board had jurisdiction to hear the *grievance* of a private car steward who was not a member of any craft or class of represented employees and who was, therefore, without the protection of a collective agreement. His suit to enforce the Board's award of reinstatement was not rejected because the award was jurisdictionally defective; the

district court's judgment for the carrier was affirmed "for the simple reason that appellant did not prove his case."

"Appellant was entitled to reinstatement only if wrongfully discharged; he was wrongfully discharged only if some right arising out of contract or the law was violated by his discharge. No evidence was introduced from which the court could draw such a conclusion." (185 F. 2d 614, 616)

(See also *Russ v. Southern Railway Co.*, supra, 334 F. 2d 224.)

Petitioner here suggests that extension of the Board's power to hear and determine *grievances* as well as disputes growing out of the interpretation and application of agreements is clear indication that Congress did not intend to limit the Board's power to the interpretation and application of the latest edition of the "agreement". There is recognition here that in the railroad industry correlative rights and duties between carriers and their employees are created by the conference system employed in the settlement of claims and provided for by Section 2, Sixth of the Act (45 USC § 152, Sixth) as well as by the consensual agreements which emerge from the negotiations for "changes in agreements affecting rates of pay, rules or working conditions" pursuant to Section 6 of the Act (45 USC § 156).

The decisions below limit the area of the Board's search for rights and duties upon which to predicate its award to the confines of a fifteen year old booklet.

Consideration of the "custom and practice" which petitioner alleged to be a source of his right to remain in service was denied.

(But custom and practice does provide evidence of contractual rights and obligations. In *Order of Railway Conductors v. Pitney*, 326 US 561, this Court said—

"The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. [citing authorities] For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue." (326 US 561, 566-567)

This observation that interpretation of collective agreements in the railroad industry involves more than "the mere construction of a document" conflicts sharply with that of the District Court in this case—

"Accordingly, we hold that the right of the carrier to terminate the employment of its workers, except as prohibited by statute, remains with the carrier to the extent not surrendered by the

terms of a collective bargaining agreement, and that the extent of such surrender is to be determined by the plain words of the agreement under the rules governing the interpretation of contracts." (R 76, emphasis added))

Also, no allowance was made to the Board to consider the product of the continuing negotiations since November 30, 1938, the date the agreement set out in the booklet was executed, and the date of petitioner's removal from service, December 30, 1954, as a source of his right to independent appraisal of his physical fitness. (See affidavit of J. P. Colyar and attached exhibits, R 105 *et seq.*) No credit was granted to the Board's interpretation of the applicable agreement based upon the conflict between the right of the carrier to determine the physical fitness of its employees for service and that of the employee to continued service in accordance with his seniority.

This not only contravened this Court's expressions as to the expertise of the Board and Congress's grant of presumptive validity to its findings; it is irreconcilable with "the Federal law, fashioned 'from the policy of our national labor laws' " which controls. *Wiley & Sons v. Livingston*, 376 US 543, 548 quoting from *Textile Workers Union v. Lincoln Mills*, 353 US 448, 456. For, under that law—

"* * * . . . a collective bargaining agreement is not an ordinary contract. ' . . . (I)t is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate . . . The collective bargaining agreement covers the whole

employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.” *Wiley & Sons v. Livingston*, supra, 376 US 543, 550 quoting from *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 US 574, 578-579.

In *Textile Workers Union v. Lincoln Mills*, supra, this Court ruled that Section 301 (a) of the Labor Management Relations Act of 1947, by conferring jurisdiction upon federal district courts to hear and determine suits for violation of collective bargaining agreements resulting from the collective bargaining process structured by that Act, “expressed a federal policy that federal courts should enforce these agreements . . . and that industrial peace can be best obtained in that way.” (353 US 448, 455.) Further it was held that “the substantive law to apply in suits under § 301 (a) is federal law which the courts must fashion from the policy of our national labor laws.” (353 US 448, 456.)

In *Machinist's Asso. v. Central Airlines*, 372 US 682, this Court held that a suit to enforce an award of an airline system board of adjustment established by agreement pursuant to Section 204 of the Railway Labor Act (45 USC § 184) was a suit “arising under the Railway Labor Act and the District Court therefore has jurisdiction under 28 USC 1331 if the jurisdictional amount is satisfied and in any case under § 1337.” (372 US 682, 696.) More important for the case at bench, the Court made it clear that in such

enforcement action the law which the courts must fashion from the policy of our national laws applies.

“Whether Central must comply with the award or whether, instead, it is impeachable are questions controlled by federal law and are to be answered with due regard for the statutory scheme and purpose.” (372 US 682, 695.)

In support of this view the Court quoted from *Railway Employees Dept. A.F. of L. v. Hanson*, 351 US 225, 232—“(A) union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it.” 372 US 682, 692.)

Most recently, in *Republic Steel Corp. v. Maddox*, US, 13 L ed 580, 85 S Ct 614, this Court, by refusing to extend the rationale of *Moore v. Illinois Central R. Co.*, 312 US 630, and *Transcontinental & Western Air v. Koppal*, 345 US 633—“that federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act”—(13 L ed 580, 585, 85 S Ct 614, 617)—suggests strongly that the “precepts of Lincoln Mills” (13 L ed 580, 585, 85 S Ct 614, 618) are applicable to civil suits brought pursuant to the Railway Labor Act to enforce the terms of a collective bargaining agreement as incorporated into an award and order of the Adjustment Board.

What, then, is the law, fashioned from the policy of our national labor laws, as to the effect in the enforcement action of the Board’s findings as to the underlying rights and duties of railroad carriers and

employees resulting from the collective bargaining and dispute-adjusting process structured by the Railway Labor Act?

Petitioner respectfully submits that the answer to this question is found in the Congressional mandate—"on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated"—and the decisions of this Court commonly referred to as the Steelworkers Trilogy.

The Court of Appeals did not consider that the principles enunciated in *United Steelworkers of America v. American Mfg. Co.*, 363 US 564, *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 US 574, and *United Steelworkers v. Enterprise Corp.*, 363 US 593 applied here because "Here the parties have not agreed to arbitrate." (R 232.)

This ignores the realities of collective bargaining in the railroad industry.

Collective agreements are made pursuant to Congress's mandate—"It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements, or otherwise, in order to avoid any interruption to commerce or the operation of any carrier growing out of any dispute between the carrier and the employees thereof." (45 USC § 152, First.) Such disputes "shall be consid-

ered and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." (45 USC § 152, Second.) This duty to confer "in respect of such dispute" requires either party, on ten days notice from the other, to specify a place for the conference and a time therefor not to exceed twenty days from the receipt of such notice (45 USC § 152, Sixth). And, if the dispute is not resolved by the parties by being "handled in the usual manner up to and including the chief operating officer designated to handle disputes . . . (it) . . . may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board. . . ." (45 USC § 153, First (i); emphasis added.)

Thus, by entering into an agreement such as that contemplated by the Act, the parties brought themselves within the aegis of a comprehensive statutory dispute-adjustment scheme which includes, as an integral part, the "therapy of arbitration." *Carey v. Westinghouse Electric Corp.*, 375 US 261, 272.

The 1938 booklet contains provisions which, although formulated in the incomplete and unlawyerlike manner which characterizes the entire document, indicate that the dispute-adjusting method described in the Act was to be employed. (Examples are Articles 65 and 66 set forth at page 81 thereof.) (R 19.)

Thus, not only does the applicable agreement comprehend Board proceedings as the final step in the

“administrative remedy”, but, in addition, the record herein demonstrates that when petitioner, through his organization, the BLF&E, exercised his right to refer the dispute to the Board, SD&AE participated fully in the proceedings, and, for that matter, acquiesced in the Board’s first order by participating in the selection of a three-physician board.

Recent decisions of this Court, in effect, limit the railroad worker with a grievance to his petition to the Board, and the railroad worker who has obtained a favorable Board award to the civil suit provided by subsection First (p) of Section 3 of the Act. Strikes to remedy such a grievance or to enforce such an award may be enjoined. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 US 30; *Brotherhood of Locomotive Engineers*, *supra*, 373 US 33.

Thus, to the railroad employee, the work of the Board, and the recognition accorded to it by the federal district courts, has acquired the same importance as has the work of arbitration tribunals, and the judicial reception accorded their work, to the industrial employee working under a collective agreement which includes a no-strike clause. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, *supra*, 363 US 574; *United Steelworkers v. American Mfg. Co.*, *supra*, 363 US 564.

In the case of the industrial worker, this Court, “developing a meaningful body of law to govern the interpretation and enforcement of collective bargain-

ing agreements" (*United Steelworkers v. American Mfg. Co.*, supra) has emphasized that because "It merely disagreed with the arbitrator's construction" of the contract does not justify the enforcing court's refusal to enforce an arbitration award. *United Steelworkers v. Enterprise Corp.*, 363 US 593, 598.

It is respectfully submitted that the decisions below are erroneous and that this cause should be remanded to the District Court for trial. It is also respectfully submitted that in the trial de novo on remand applicable federal substantive law precludes the trial court from determining the underlying rights and duties of the parties to be otherwise than as established by the findings of the Board; that its sole function will be to determine, on the basis of the evidence adduced, whether, as of December 30, 1954, petitioner was physically qualified to perform the duties which SD&AE required of its locomotive engineers.

III

THE ORDER DENYING PETITIONER'S RULE 60 (b) MOTION WAS AN ABUSE OF EQUITABLE DISCRETION; IT WAS AN UNJUSTIFIABLE REFUSAL TO RECOGNIZE THE OBVIOUS, TO WIT, THAT THE UNDERLYING RIGHTS AND DUTIES OF THE PARTIES TO A COLLECTIVE BARGAINING AGREEMENT IN THE RAILROAD INDUSTRY ARE TO BE FOUND IN THE CONTINUING COLLECTIVE BARGAINING AND DISPUTE-ADJUSTING PROCESS STRUCTURED BY THE ACT AS WELL AS THE PRINTED AGREEMENT AND, ON THE BASIS THEREOF, TO SET ASIDE THE PRIOR JUDGMENT WHICH RESTED SQUARELY UPON THE CONTRARY VIEW THAT THE SOLE SOURCE OF SUCH RIGHTS AND DUTIES WAS THE FIFTEEN YEAR OLD AGREEMENT.

The events which followed entry of summary judgment for the carrier are set forth in the foregoing statement of the case. Petitioner's counsel, at a conference with Mr. J. P. Colyar, General Chairman for the BLE in San Francisco, was advised that, as a result of negotiations with SP and SD&AE officials in 1944 and 1947, as of November 13, 1947 both the SP-BLE agreement and the SD&AE-BLE agreement included provision for independent medical appraisal to resolve disputes as to the physical fitness of locomotive engineers to continue in active service (R 143).

Mr. Colyar's views (R 109), and the confirming evidence to support same (Exhibits A through O, Colyar affidavit, R 111-138) were presented to the District Court together with affidavits of petitioner (R 139-141) and his attorney (R 142-153) in explanation of their failure to discover same prior to summary judgment.

Rule 60 (b), Federal Rules of Civil Procedure provides, in part, as follows:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); * * * or (6) any other reason justifying relief from the operation of the judgment. * * *"

Petitioner's motion, made approximately eight months after entry of the summary judgment and approximately three months after discovery by appellant of the evidence which he brought to the court's attention by means of said motion, was made upon grounds (1), (2) and (6) of the Rule (R 103-104).

The rules applicable to such motions, and review of denial of same, are set forth in the following quote from *Petition of Devlas* (SD NY, 1962) 31 F.R.D. 130.

"The tenor of the cases decided under Rule 60 (b) makes it clear that this motion is equitable in nature and appeals to the conscience of the court. *Serio v. Badger Mutual Insurance Co.*, 266 F. 2d 418, 421 (5th Cir. 1959), cert. denied 361 U.S. 832, 80 S. Ct. 81, 4 L. Ed. 2d 73 (1959): 'The rule is to be liberally construed in order that judgments may reflect the true merits of a case.' *Consolidated Gas & Equipment Co. of America v. Carver*, supra, 257 F. 2d at p. 104: '(T)he rule is to be liberally construed as a grant of power to a court to vacate a judgment when such action is appropriate to accomplish justice.' *Huntington Cab. Co. v. American Fidelity & Casualty Co.*, 4

F.R.D. 496, 498 (S.D. W. Va. 1945): 'The courts have given this rule [60 (1)] a liberal construction, always trying, when possible, to see that cases are decided on their merits.' *Pierre v. Bermuth, Lemke Co.*, 20 F.R.D. 116 (S.D. N.Y. 1956), in which Judge Bryan quotes with approval from 7 Moore, Federal Practice, p. 308 (2d ed. 1950): 'This provision is a grant reservoir of equitable power to do justice in a particular case.' See *Fiske v. Buder*, 125 F. 2d 841 (8th Cir. 1942); 3 Barron & Holtzoff, Federal Practice and Procedure, Rules Ed., 392, 1332."

In a double barreled rejection of appellant's motion, the District Court "found *nothing* in the record to justify petitioner's failure to discover and present to the court prior to the rendition of judgment the evidence he now proffers" (R 214), and held that, in any event "(R)ecourse to statements in affidavits filed by the defendant is not necessary for us to see that petitioner has not produced *and would not be able to produce at a trial*, any evidence which could lead to a determination in his favor." (R 214.)

It is true that SD&AE was able to show that Mr. Colyar wrote to SD&AE about its intentions with respect to the Board's award in 1958 and that on March 29, 1960 petitioner authorized Mr. Colyar to assert against the carrier his claim to reinstatement and back pay pursuant to said award. But this circumstantial evidence is insufficient to rebut the sworn statements of petitioner and his counsel denying knowledge of the correspondence establishing the provision for a three-physician panel until the conference of

February 28, 1962 and affirming their lack of access to the files containing such correspondence. The intricacies of inter-union rivalry and labor-management relations in the railroad industry afford numerous explanations as to how Mr. Colyar could be querying the carrier as to enforcement of the award and, subsequently, securing petitioner's authorization to permit him to present same to the carrier, and still not communicate to petitioner or his counsel the contractual documentation in support of the claim.

Instead of giving to petitioner the benefit of doubt on this score, the Court chose to infer that petitioner either knew, or in the exercise of reasonable diligence could have known of the existence of the correspondence establishing the three-physician system. It did this despite the evidence that for many years prior to March 29, 1960, when petitioner finally sought the assistance of the BLE in asserting his claim, Mr. Colyar was a BLE official representing engineer employees who adhered to the BLE and petitioner was an official of a rival union, BLF&E, representing employees who adhered to that organization. It is respectfully suggested that this indicates that the District Court did not exercise discretion in rejecting petitioner's explanation but, instead, permitted its understandable reluctance to render idle the effort which had been expended in making its decision on summary judgment to stay the exercise of such discretion.

The second ground of the Court's denial of petitioner's Rule 60(b) motion was that petitioner had not produced and would not be able to produce at trial

any evidence which could lead to a determination in his favor. The Court's prediction that petitioner would not be able to produce at trial any evidence which could lead to a determination in his favor should not be construed as an assertion of omniscience on the part of the Court; it emphasizes, instead, its somewhat dogged resistance to the notion that there could be evidence of the applicable agreement other than the contents of the fifteen year old booklet.

The Rule 60(b) motion was directed at a summary judgment which, of course, should not have been granted unless the record left no doubt as to the absence of factual issues for trial. We submit that the newly discovered evidence should have been considered by the District Court in terms of whether it created doubt as to the propriety of the summary judgment; not as to whether it changed the Court's mind as to what the agreement of the parties was with respect to the right of the company to determine the physical qualifications of its employees for active service. The Court's reliance upon the omission of a three-physician panel provision from the revised booklet of January 1, 1956 evidences that, in passing upon appellant's Rule 60(b) motion, the Court was weighing the evidence, not determining whether the newly discovered evidence created doubt as to whether there were factual issues for trial. Obviously, the omission of the three-physician panel provision from the 1956 booklet does not eliminate all possibility of the existence of such a provision as a term of the applicable agreement as of December 30, 1954. Upon

trial petitioner may be able to produce an explanation for the omission of the provision from the 1956 booklet.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below must be reversed and this cause remanded to the District Court for trial.

Dated September 20, 1965.

CLIFTON HILDEBRAND,
Attorney for Petitioner.

CHARLES W. DECKER,
Of Counsel.

(Appendix A Follows)

Appendix A

RAILWAY LABOR ACT, SECTIONS 2 AND 3

§ 152.

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their

representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions

of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an

investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000, nor more than \$20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate

offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor

organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine,

train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238.

§ 153.

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through

the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and

if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its mem-

bers to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case

a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for

costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the

compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall

state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of

carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board. May 20, 1926, c. 347, § 3, 44 Stat. 578; June 21, 1934, c. 691, § 3, 48 Stat. 1189.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 27

F. J. GUNTHER,

Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY, a corporation,

Respondent.

Answering Brief of Respondent on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

STATUTES INVOLVED

In addition to the Statutes cited by Petitioner, this case involves Section 6 of the Railway Labor Act (48 Stat. 1197), which is printed in Appendix A hereto.

QUESTION PRESENTED

The question presented is whether medical arbitration of Petitioner's physical condition can be imposed upon Respondent by the National Railroad Adjustment Board under Section 3 of the Railway Labor Act where there is no

agreement providing for arbitration or limiting the Respondent's right to determine in good faith the physical fitness of locomotive engineers.

A subsidiary question is whether the District Court acted within its discretion when it denied Petitioner's motion to vacate the judgment in order to introduce evidence, because the evidence would not contradict the facts essential to the judgment and also because the evidence could have been discovered by the exercise of due diligence.

STATEMENT OF THE CASE

Believing Petitioner's "Statement of the Case" (its brief, pp. 7-30) to contain extensive irrelevant and immaterial matter, Respondent San Diego & Arizona Eastern Railway Company (hereinafter referred to as SD&AE, Respondent, railroad or carrier) submits the following as its statement:

Petitioner Gunther (hereinafter referred to as Petitioner) was employed by SD&AE as a locomotive engineer until December 30, 1954, shortly after his seventy-first birthday,¹ when the medical doctors of the railroad determined that his heart was in such condition that he would be likely to suffer an acute coronary episode (R. 2, 32, 33, 41-42). He was disqualified from active service of operating trains and it was suggested that he take his pension. Petitioner contends that this action of SD&AE violated his rights under the collective bargaining agreement (hereinafter referred to as Agreement) between the locomotive engineers represented by the Brotherhood of Locomotive Engineers (here-

1. Long standing SD&AE safety requirements were and are that locomotive engineers must take and pass periodic physical examinations (R. 40-41). An engineer who reaches age 70 in service must be so examined every 90 days. Petitioner took these examinations regularly until December 30, 1954, when the physicians found the disqualifying coronary condition (Pet. Br. 12-13).

inafter referred to as BofLE) and SD&AE (R. 2). Nowhere does he challenge the competence, good faith or wisdom of the decision of these doctors or the fairness of the standard of fitness used and applied to his physical condition or the adequacy of the medical determination (R. 1-7).

Petitioner sought and obtained an award of the National Railroad Adjustment Board (hereinafter referred to as Adjustment Board or Board)² requiring the utilization of a three-doctor panel to arbitrate the question as to Petitioner's disability and the propriety of his removal from service notwithstanding the opinion of the railroad medical staff (R. 6-7). The Adjustment Board said:

"Carrier contends that . . . there is no rule [in the collective bargaining agreement covering locomotive engineers] permitting the appointment of a neutral medical board as here sought [by Mr. Gunther] and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.

" . . .

"If carrier through its medical staff has removed an employee from service in good faith, on the basis of a fair standard of fitness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service." (R. 6) (Clarifying words added in brackets).

No inquiry was made by the Adjustment Board or by the three-doctor board into the question of good faith of SD&AE

2. Bi-partisan tribunal established in Section 3 of the Railway Labor Act (45 U.S.C. § 153) to make findings and awards on disputes between employees and carriers growing out of grievances or out of the interpretation or application of collective bargaining agreements. The instant case involves a purported award of the First Division which has jurisdiction over operating employees and reference to Adjustment Board in this brief refers to that Division.

and the medical staff, fair standard of fitness or adequacy of the determination and there was nothing in the record showing or suggesting any such deficiency (R. 5-11). Instead of discussing the fact alleged by the SD&AE that there was no Agreement rule providing for arbitration, the Board declared in the 1956 Award:

“... it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision for the Division [Adjustment Board] to provide for a neutral board of three qualified physicians, ...” (R. 6) (Words in-brackets added).

In the later “Interpretation” of October 8, 1958, the Board again made no reference to any inadequacy or lack of good faith which it said was the test of the validity of the disqualification of Petitioner for safety reasons in its October 2, 1956, award. The Adjustment Board simply recited that a majority of the three doctors on the arbitration panel did not support the decision of Respondent's Chief Surgeon (R. 10). Basing its decision on this purported finding the Adjustment Board ordered Respondent SD&AE to reinstate Petitioner with back pay (R. 11).

Thereupon SD&AE refused to reinstate Petitioner to active service to the position of locomotive engineer with back money payment on the basis that the purported award and Interpretation were void and in excess of the jurisdiction of the Adjustment Board (R. 34-35). Petitioner filed the instant enforcement proceeding under the provisions of Section 3, First (p) of the Railway Labor Act (45 U.S.C. § 153, First (p)) contending that the said removal “from active service on the ground that he was not physically qualified to perform the duties of a locomotive engineer” imposed retirement in violation of Petitioner's seniority rights under the Agreement (R. 2).

SD&AE filed a motion for summary judgment supported by affidavits (R. 12-21) setting forth the context of the

Agreement and all of its pertinent provisions as of December 30, 1954, the date of Petitioner's disqualification. The exhibits to the affidavit filed on behalf of SD&AE include the demand of the BofLE³ dated August 28, 1959, for the adoption of a three-doctor medical arbitration panel in this same collective bargaining Agreement (R. 20-21), together with the resulting Agreement provision effective December 1, 1959 (R. 17-19). Prior to 1959 there was no provision in the Agreement for such a review procedure. (R. 14, 41, 60). The collective bargaining Agreement has provided for such an arbitration with respect to the physical condition of a locomotive engineer from and after December 1, 1959, which was approximately five years after Mr. Gunther's physical disqualification. These facts were not controverted by Petitioner. SD&AE's motion for summary judgment was based on three grounds: (I) the April 8, 1959, judgment in the first Gunther enforcement action is *res judicata* (R. 24-28; Preliminary opinion in 161 F.Supp. 295); (II) more than two years expired between October 2, 1956, the date of the first Adjustment Board Award and Order (R. 5-8),⁴ and the

3. Railroad Labor organization certified under Section 2 Ninth of the Railway Labor Act (45 U.S.C. § 152 Ninth) to represent the craft of locomotive engineers employed by SD&AE. It happens that Mr. Gunther at all times material hereto was and is General Chairman of the Brotherhood of Locomotive Firemen and Enginemen and actively represents member locomotive firemen and engineers in the application of both the instant Agreement and also the agreement covering firemen on SD&AE. His claim in the case at bar is based upon his own employment as a locomotive engineer under the Agreement covering that craft on SD&AE. He was thoroughly familiar with the Agreement and its interpretation and application by the parties in the operations of SD&AE (Pet. Br. 21).

4. The second action of the Adjustment Board (R. 9-11) is entitled "Interpretation" and declares (R. 10): "The issue of fact upon which the prior Award 17646 was conditioned having been determined in favor of claimant, said conditional award should be made absolute and final and the claim sustained as therein pro-

date of filing the case at bar, September 26, 1960, which exceeds the two-year statutory period in Section 3, First (q) of the Railway Labor Act (45 U.S.C. 3, First (q)); and (III) a purported Award of the Adjustment Board issued without jurisdiction is void and unenforceable. The District Court denied the motion without prejudice to a subsequent renewal on Ground No. III.

Thereafter SD&AE filed its answer (R. 32-37).⁵ One month later SD&AE renewed its motion for summary judgment based upon the ground that the Adjustment Board had exceeded its jurisdiction (R. 38-39). This motion was granted and was thereafter affirmed by the Court of Appeals for the Ninth Circuit (R. 226-235). It is now before this Court for review.

At all times in this proceeding Respondent SD&AE has consistently pointed to the written Agreement and sworn affidavits supporting its position that there is no provision in the Agreement for review or arbitration of the decisions of its medical doctors made upon adequate examination and in good faith. Its position is buttressed by the additional fact that the BofLE, party to the Agreement, made a demand (R. 20-21) upon Respondent SD&AE five years later under Section 6 of the Railway Labor Act (45 U.S.C. 156) for such an arbitration clause which resulted in amending

vided." Although the enforcement action brought by Mr. Gunther upon said first Award 17646 was pending at the time when the Interpretation Award 17646 was issued, his refusal to introduce the same into the proceeding before final judgment was pleaded in SD&AE's answer in the instant case (R. 34) and was discussed in the opinion of the District Court (R. 56).

5. The answer contains seven separate affirmative defenses, including *res judicata*, bar of the statute of limitations and failure of the Adjustment Board to afford SD&AE notice of the proceedings or opportunity to be heard or represented as required by the Fifth and Fourteenth Amendments to the Constitution and Section 3 First (j) of the Railway Labor Act (45 U.S.C. 153, First (j)).

the Agreement in 1959 (R. 17-19). Petitioner claims that in December 1954 the Agreement contained a three-doctor arbitration provision or limitation upon the right of the Respondent to rely in good faith upon its Chief Surgeon's advice concerning physical condition. The District Court on many occasions admonished Petitioner to point to at least some evidence of such a limitation (R. 30, 233). He failed to specify or offer any such evidence throughout either the first or second cases or at all prior to judgment (R. 30, 215).

After the instant case was on appeal Petitioner, with approval of the Court of Appeals, moved the District Court to reopen the case and set aside the judgment under FRCP Rule 60(b) (R. 103-105). The District Court heard the motion after remand and in its Order Denying the Motion dated April 10, 1963, found that the evidence purporting to show the existence of a medical arbitration panel under the Agreement consisted of letters dated 1944 through 1947 to the effect that interpretations of rules in one agreement would also apply to "similarly worded rules" in the instant Agreement but no "similarly worded rules" were shown to exist (R. 216-217); that the letters would have been printed as a part of the booklet Agreement of 1938 (green cover; R. 15—documentary exhibit attached to page 266 of original record) (R. 210, 215) as reprinted in 1956 (orange cover) (R. 215) in accordance with Petitioner's description of the prevailing practice relating to the printing of agreements (R. 106-107); and that in any event Petitioner has no valid excuse for lack of due diligence in failing to discover and produce the letters prior to final judgment dated October 27, 1961 (R. 214, 234). Petitioner was thoroughly familiar with the Agreement, practices and customs on the railroad (R. 52), and he, as a union representative, handled with SD&AE disputes over the applica-

tion of the Agreement (covering locomotive engineers) on behalf of other employees (R. 52) and was "thoroughly familiar with said Agreement and its interpretation and application by the parties thereto in the operations of defendants" (Pet. Br. 21 par. 6). Moreover, Petitioner gave written authorization to the BofLE and its general chairman on SD&AE (Mr. J. P. Colyar, R. 168-170) to act as his (Mr. Gunther's) representative in handling the instant case. This authorization was effective March 28, 1960, approximately six months before September 26, 1960, when the instant action was filed (R. 1). In light of the uncontroverted facts thus set forth, the District Court denied the motion for relief from judgment on March 29, 1963 (R. 218-219). The Court of Appeals for the Ninth Circuit affirmed on September 4, 1964 (R. 226-235).

In particular reference to Petitioner's statement of the case (Pet. Br. 7-30), it should be noted that there is no clear separation between the facts occurring prior to the judgment of October 27, 1961 (R. 97) and those relating to the motion for relief under FRCP Rule 60(b) from the judgment which was filed on June 4, 1962 (R. 103).⁶ Without any implication with respect to Petitioner or his brief, this is simply noted to emphasize the fact that at all times prior to the motion under FRCP Rule 60(b) there was no indication of any evidence which would support an appeal from the decision of the SD&AE medical staff to a three-doctor medical arbitration panel under the controlling Agreement. Many of the references to facts in Petitioner's statement of

6. As Petitioner himself states (Pet. Br. 6), if an evidentiary item was available to the District Court before judgment in this case it will bear a record page number between 1 and 97. Post judgment materials bear the record number herein of 98 to 237.

FRCP refers throughout this brief to Federal Rules of Civil Procedure (28 U.S.C.).

the case are to evidence relating to the 1944-1947 letters which he was not permitted to introduce for the first time in 1962 for reasons set forth in the opinion of the District Court (R. 214-215, 217). Thus the references to rivalry between the BofLE and Brotherhood of Locomotive Firemen and Enginemen (Pet. Br. p. 8) have nothing to do with any issue in the case excepting his purported excuse for not presenting the 1944-1947 letters prior to his 1962 motion.⁷

Similarly, the material appearing on pages 11 and 12 of Petitioner's brief, which is designated by references to record numbers above page 98, involves the letters of interpretation of 1944-1947 which were not before the court prior to the judgment of October 27, 1961. The material appearing on page 26 through the middle of page 29, inclusive, of Petitioner's brief also pertains to the subsequent motion for relief from judgment filed in June of 1962 (R. 103).

The District Court found no evidence in the applicable collective bargaining Agreement, in any amendment thereto or in any custom or practice thereunder of any limitation on the right and duty of SD&AE to determine in good faith the physical capacity of its locomotive engineers and to disqualify them from operating locomotives when its doctors find a disabling condition such as a coronary impairment (R. 79, 215, 218). It was further determined that prior to 1959 there was no applicable agreement provision for the arbitration of such decisions of railroad physicians (R. 215). Having concluded that the Adjustment Board exceeded its jurisdiction by ordering a three-doctor arbitration panel in this case without Agreement support, the Court granted summary judgment (R. 97). Thereafter a

7. As explained above, no significance attaches to such evidence since he authorized the BofLE in writing to represent him in this matter some six months before filing this action (R. 168-169).

hearing was held pursuant to FRCP Rule 60(b) upon Petitioner's motion to vacate the judgment in order to submit what he characterized as "newly discovered evidence." On April 10, 1963, the District Court denied the motion (R. 207, 218-219). The Court of Appeals for the Ninth Circuit affirmed (R. 226-235). On March 1, 1965, this Court granted certiorari (R. 237).

SUMMARY OF ARGUMENT

This case presents the issue whether the National Railroad Adjustment Board is empowered under the Railway Labor Act (45 U.S.C. § 151 et seq.), without any support in the collective bargaining Agreement, to impose upon the parties an arbitration for the review of the decision of medical doctors disqualifying a locomotive engineer from operating an engine. The decisions of the courts below should be affirmed on the basis that an award in favor of Petitioner should not be enforced under Section 3, First (p), of the Railway Labor Act (45 U.S.C. § 153, First (p)) because the Adjustment Board exceeded its jurisdiction; and further, the findings in the award do not support the order.

I

The undisputed facts which are material to this issue show that summary judgment was properly granted under FRPC 56 (28 U.S.C.). Petitioner was removed from active service in good faith on a medical determination that his physical condition rendered his operation of locomotives unsafe. There was no rule in the Agreement limiting SD&AE in taking action upon such determinations or providing for any review or arbitration thereof. While the Adjustment Board's findings noted no such provision, it

ordered a medical arbitration panel and accepted the decision thereof as its own award.

The Adjustment Board cannot lawfully use its power under Section 3 of the Railway Labor Act (45 U.S.C. § 153) to interpret and apply Agreement provisions as a means of creating new limitations on the rights and duties of the parties. Instead Section 6 of the Act (45 U.S.C. § 156) must be used for that purpose, in the manner in which it was used in this case in 1959.

II

This case is not similar to the situation where an Adjustment Board award contains findings interpreting the collective bargaining agreement in a somewhat vague and indefinite manner. The courts are receptive to the enforcement of such awards within reasonable limits. *Kirby v. Pennsylvania R.R.*, 188 F.2d 793 (3rd Cir. 1951); *Hodges v. Atlantic Coast Line R.R.*, 310 F.2d 438 (5th Cir. 1962). The award in the instant case does not find that the Agreement was violated or that it provides for arbitration (R. 5-11). The order based thereon is void and unenforceable. Both *Kirby* and *Hodges* contained findings that the basic Agreement had been violated. *Hodges* had never had a physical examination at all; and the Court of Appeals ordered a medical examination, subject to arbitration, to provide the Board with a medical examination for its use but not for it to substitute the findings for its own decision. There must be facts disclosed in the findings upon which an award could be based. *Railroad Yardmasters v. Indiana Harbor Belt R.R.*, 166 F.2d 326 (7th Cir. 1948), 45 U.S.C. § 153, First (p).

III

The federal law applicable to the enforcement of arbitration contracts under the Labor Management Relations Act, 1947 (29 U.S.C. § 185), is that all intendments are in favor of arbitration. The parties have agreed to arbitration and are regarded as having intended this result. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). The latter case specifically recognizes that an arbitrator is confined to the interpretation and application of the collective bargaining agreement, and enforcement will be refused where his words show an infidelity to this obligation. Since airline cases under the Railway Labor Act involve consensual arbitration and are not subject to Section 3, First (p) (45 U.S.C. § 153, First (p)), they are not in point with the instant situation.

IV

Section 3, First (p) of the Railway Labor Act (45 U.S.C. § 153, First (p)), requires that the findings and order of the Adjustment Board are prima facie evidence of the facts stated therein, but that the findings must be stated and must be consistent with the order. The instant findings do not meet this requirement. Even if they did, the award was subject to review in the statutory manner with a trial "de novo". *Locomotive Engineers v. Louisville & N. R.R.*, 373 U.S. 33 (1963); *Russ v. Southern Ry.*, 334 F.2d 224 (6th Cir. 1964), *cert. denied*, 379 U.S. 991, *rehearing denied*, 380 U.S. 938.

V

Where a motion is made under FRCP Rule 60(b) (28 U.S.C.) to vacate a judgment entered eight months earlier to permit the production of "newly discovered" evidence,

denial of the motion is not an abuse of discretion where the affidavits of the parties disclose that the evidence would neither contradict established material facts nor otherwise change the conclusion of the court. In addition, the court may properly exclude such evidence if it could have been discovered with due diligence before judgment was entered. In the instant case, Petitioner's representative was actually in possession of the purported evidence six months before the complaint was filed and more than two years before the notice of this motion was filed. This is neither an abuse of the court's discretion nor prejudicial to Petitioner in the circumstances.

ARGUMENT

I. The Undisputed Facts Disclose the Imposition of Arbitration by the Adjustment Board Without Consent of the Parties and Fully Support the Entry of Summary Judgment.

A. The Adjustment Board Exceeded Its Jurisdiction.

Petitioner contends in court, as he did before the Adjustment Board, that his rights under the seniority and discharge provisions of the Agreement were violated when SD&AE removed him on December 30, 1954, at age 71, from active service as a locomotive engineer. It has been clearly established, without any challenge, that SD&AE took this action for safety reasons upon the medical advice of its doctors that his heart was in such a condition that he might suffer an acute coronary episode (Pet. Br. 12-13; R. 14-15). Since summary judgment was rendered against him, he has moved the court to consider alleged evidence of the existence of a medical arbitration panel which has been in the possession of his own representative through written power of attorney since at least six months prior to the filing of the instant suit (R. 168-170, 214). SD&AE has presented undisputed evidence that there was no pro-

vision in the collective bargaining agreement limiting its right to disqualify locomotive engineers on the basis of the recommendations of its medical doctors (R. 215). In *Wilburn v. Missouri-Kansas-Texas R. Co. of Texas*, 268 S.W. 2d 726 (Ct. of Civ. App. of Texas—1954) the court considered the claim of a railroad employee that he was wrongfully discharged when he was disqualified upon examination by the company doctor. He demanded a three-doctor panel which was refused. No such panel was contained in the agreement at the time or at all until February, 1950. The court held that plaintiff had no cause of action for wrongful discharge under the agreement, saying at page 734:

“... There is a wide difference between a discharge because of affirmative action and a disqualification on account of physical disability as expressed in the contract which has been plead by plaintiff.”

Three undisputed evidentiary items are substantially conclusive on this point: (1) that the printed Agreement of 1938 included all interim understandings as of the date of its issuance and contained no such limitation (R. 141); (2) that the printed Agreement of 1956 (orange-colored cover) included all interim understandings as of the date of its issuance and contained no such limitation⁸ (R. 215,

8. The Agreement between SD&AE and BofLE covering locomotive engineers was reprinted at intervals so as to include all agreed provisions, understandings and supplements as of the date of printing (R. 106). While Petitioner's brief at page 11 quotes only a portion of this paragraph in Mr. Colyar's affidavit appearing on R. 106-107, he omits the significant point that the 1938 (green cover) and 1956 (orange cover) printings of the Agreement contained all of the terms on those dates, including all “changes in and additions to the terms of said agreements subsequent to such [previous] printing” (word in brackets added for clarification). Other undisputed evidence confirms the absence of a three-doctor panel provision: BofLE letter from Mr. Colyar dated January 26, 1955, preliminary to reprint of Agreement in 1956 (orange cover) reads (R. 195): “In order to bring it up to date, the settlements and

141, 145); and (3) that in 1959 a demand under Section 6 of the Railway Labor Act (45 U.S.C. § 156) was made upon SD&AE by the BofLE to adopt such a clause in the Agreement (R. 20, 21) and thereafter on November 3, 1959, an amendment was made to the Agreement providing for such a medical arbitration to become effective December 1, 1959 (R. 17-19). The findings of the Adjustment Board specifically recognize the right of the SD&AE to disqualify a locomotive engineer from active service in good faith on the advice of its medical staff (R. 6). The Adjustment Board made no finding of or reference to any Agreement rule establishing a three-doctor board review of such a decision (R. 5-11). The Adjustment Board proceeded to order the arbitration without regard to the lack of consent of the parties. The subject of arbitration was to determine at a date not earlier than October, 1956, whether at least two out of three doctors would agree with the opinion of the SD&AE medical staff rendered in 1954 when Petitioner was under the continual strain of operating trains. Thus, the Adjustment Board itself, in interpreting the Agreement, pointed to the right asserted by the SD&AE before it arbitrarily referred the matter to the three-doctor panel on the above question (R. 6) and substituted the judgment of the panel for its own in the case (R. 7, 10).

agreements set forth hereafter should be applied to present rules or corrections made, whichever is applicable. . . . *Article 35—No Change. . . .*" (R. 200). The medical arbitration provision was incorporated in the Agreement for the first time in 1959 as follows: "It is hereby understood and agreed that *Section 1, Article 35 is amended by adding the following thereto*" (R. 17-21). The District Court queried counsel for Petitioner at the hearing as to why the provision did not appear in the 1956 (orange cover) reprint if in fact it was added by means of the 1944-1947 letters or otherwise and the answer was: "A reasonable inference to be drawn for its omission from the orange-covered booklet as of January 1, 1956, is that it was inadvertently omitted by those charged with the responsibility of seeing that all existing contractual provisions were incorporated there" (R. 215). (Emphasis Added.)

At no time was an agreement to arbitrate mentioned. The Adjustment Board exceeded its jurisdiction under Section 3 of the Railway Labor Act (45 U.S.C. § 153—reproduced in Pet. Br. Appendix A, pages ix-xix) in requiring non-consensual arbitration. As we have shown above, Section 6 of the Railway Labor Act (45 U.S.C. § 156) provides for the making and changing of agreements.⁹ Section 6 was utilized by these parties in 1959 in this precise situation. If agreement rights can be swept away or conferred by fiat of a particular referee (neutral member) of the Adjustment Board, the next case may well result in the denial of medical arbitration which the BofLE obtained in 1959. This type of ruling on the part of the Board would completely unstabilize the contractual relations between the railroads and their employees. Section 6 should be retained for making and changing agreements. Section 3 should be utilized solely for interpreting and applying the provisions of such agreements.

B. Summary Judgment Did Not Prejudice Petitioner and Was Proper.

It is submitted that the disposition of this case upon motion for summary judgment under FRCP Rule 56 was correct and proper. One of the principal affirmative defenses in the answer was this challenge to the jurisdiction of the Adjustment Board when it imposed arbitration upon the parties (R. 36). At the instance of Petitioner, the Board interpreted the agreement in light of its seniority provisions. Its findings were that if the SD&AE removed Petitioner from active service in good faith reliance upon the advice of its medical staff, he is not entitled to have his claim sustained (R. 6). No finding of bad faith was made. No one has challenged the good faith of SD&AE either

9. Section 6 is quoted in the Appendix to this brief.

before the Board or in Court. The so-called "Interpretation" award simply incorporated the additional finding of the medical arbitration panel that Petitioner had no physical defects which would prevent him from operating engines two years theretofore (R. 10). The purported order of October 8, 1958, was based on mandatory arbitration and, further, was contrary to the findings. The question is a legal one based upon undisputed facts. Petitioner was not prejudiced in any way by the proceedings. The SD&AE affidavits presented competent, material facts as required by FRCP Rule 56 showing that no such Agreement provision existed. Petitioner contended that the seniority and discharge provisions prevented his compulsory retirement or removal from active service when his own doctor disputed the opinion of the SD&AE medical staff. But he did not and could not point to any provision in the Agreement substituting other opinions for that of the Chief Surgeon as to the physical qualification of a locomotive engineer. On several occasions the District Court indicated to Petitioner that he should specify some evidence of any understanding, custom, practice or other basis for his contention that the decision of the Chief Surgeon is reviewable in the absence of a claim of bad faith (R. 30-31, 79, 208, 215, 217). Petitioner has had extensive periods of time in which to discover, analyze and point to any such evidence if in fact the SD&AE affidavits were incorrect. There was no reason why Petitioner could not search the BofLE files at least six months before he filed this action because the BofLE has held his written authorization to represent him from and since March 28, 1960 (R. 168-169). The petition herein was filed September 26, 1960 (R. 4). The first motion of SD&AE for summary judgment was filed on November 28, 1960, supported by affidavits declaring that there was no provision for review of the Chief Surgeon's determination

(R. 12-13). The motion was denied on March 27, 1961, and the Court said: "Counsel for the petitioner, however, has filed no affidavit to show what parol evidence he deems important, nor, for that matter has he pointed out in what particulars the contract may be ambiguous." (R. 30) ". . . If other matters are to be passed upon, let them be presented in proper form" (R. 31). The answer was filed on April 24, 1961 (R. 32). On May 16, 1961, SD&AE filed its second motion for summary judgment (R. 38) supported by affidavits again demonstrating the foregoing particular facts (R. 40-42). Petitioner's opposing affidavit explained the operation of seniority, but made no reference to physical disqualification or review of decisions of the doctors and ignored the above-quoted indications of the District Court that he would be called upon to point to some evidence of the alleged limitation (R. 52-54). Further detail of the events in this case appears in the Opinion of the District Court dated September 27, 1961 (R. 56-67). Throughout the period of one year from filing the petition until the granting of summary judgment, Petitioner did not point to any evidence to contradict the affidavits of SD&AE. It is incumbent upon the opposing party to disclose what the evidence will be to establish a genuine issue of fact. He may not hold back his evidence until trial. *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469 (2nd Cir. 1943); *Surkin v. Charteris*, 197 F.2d 77, 79 (5th Cir. 1952); *Gifford v. Travelers Protective Assn.*, 153 F.2d 209 (9th Cir. 1946); *Orvis v. Brickman*, 196 F.2d 762 (D.C. Cir. 1952). In 6 Moore's Federal Practice (2d Ed.) this principle is discussed as follows (p. 2130):

"And although the moving party be unaided by any presumption, when he has clearly established certain facts the particular circumstances of the case may cast a duty to go forward with controverting facts

upon the opposing party, so that his failure to discharge this duty will entitle the Movant to Summary Judgment."

At page 2131 this authority states:

"To defeat a movant who has otherwise sustained his burden within the principles enunciated above, the party opposing the motion must present the facts in proper form—conclusion of law will not suffice; . . ."

The case was properly decided on the undisputed facts.

II. The Adjustment Board Cannot Require Arbitration or Change the Agreement Under the Guise of Interpretation.

At page 45 of his brief, Petitioner states: "The *ultra vires* doctrine had its inception in a dictum in *Hunter v. Atchison, T. & S.F. Ry.*, (CA 7, 1948) 171 F.2d 594" and he quotes a portion of the case as follows:

"The *ultra vires* doctrine has its inception in a dictum in *Hunter v. Atchison, T. & S.F. R. Co.* (CA 7, 1948) 171 F.2d 594, a suit by a group of train porters to enjoin the implementation of an award issued in a proceeding to which they were not a party. In affirming the grant of injunctive relief the court of appeals said—

" . . . In reality what the Board did was not merely to exercise its statutory authority to interpret and apply the contract as it existed but to make a new and different contract between the brakemen and the carrier.

" . . .

"While we are of the view that the Award is void because the Board exceeded its authority, we place our decision primarily upon the ground that it was made without notice to the porters, as the statute requires, and that their constitutional right to a hearing was denied." (171 F.2d 594, 599.)"

The Court affirmed an injunction against the Adjustment Board and the Santa Fe Railroad from making effective an award giving the trainmen certain passenger braking duties which had been performed by train porters for many years. The award was based on an interpretation which was not sustainable on the facts. At page 599, the Court of Appeals declared that while it was of the view that "... the Award is void because the Board exceeded its authority," its decision was primarily on the basis of lack of notice required by Section 3, First (j) of the Railway Labor Act (45 U.S.C. § 153, First (j)). In the preceding paragraph on page 599, the Court also said:

"... In reality, what the Board did was not merely to exercise its statutory authority to interpret and apply the contract as it existed but to make a new and different contract between the brakemen and the carrier. We think the five members of the Board who dissented from the Award properly characterized the action of the majority when they stated in their dissenting opinion: 'The lesson of the award is that contracts may be altered, changed, or amended, in plain violation of the Railway Labor Act, merely by the assertion of a claim which has no foundation for support in the agreement. That these are the correct conclusions to be drawn from the wanton usurpation of power by the majority which voted for the award, is adequately fortified by the undisputed facts of record which were before us.'"

At page 46 of his brief, Petitioner indicates that the foregoing was repeated in *Thomas v. New York, C. & St. L. R.R.*, 185 F.2d 614 (6th Cir. 1950). While the Court did not cite *Hunter* (171 F.2d 594), *supra*, it came to the conclusion suggested therein, saying at page 616:

"... Appellant was entitled to reinstatement only if wrongfully discharged; he was wrongfully discharged

only if some right arising out of contract or the law was violated by his discharge."

And at page 617:

"... While the Board [Adjustment Board] under the statute has jurisdiction to hear an individual grievance, it is not authorized to write a contract for the parties nor to create substantive legal rights."

See, in accord, *Southern Pac. Co. v. Joint Council Dining Car Employees*, 165 F.2d 26 (9th Cir. 1947), *cert. denied*, 333 U.S. 838 (1948), in which the references to Board jurisdiction appear in Footnote 2; *Munhollon v. Pennsylvania R.R.*, 180 F.Supp. 669, 673 (N.D. Ohio 1960). Petitioner further contends at page 46 of his brief, that limitation of the Adjustment Board's jurisdiction to the interpretation and application of agreements is questionable because of the language of the statute, which reads:

"(i) The disputes between an employee . . . and a carrier . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred by petition of the parties . . . to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (45 U.S.C. § 153, First (i)).

Petitioner's claim to the Adjustment Board and his contention in court demonstrate that his grievance is solely a dispute over the interpretation or application of the collective bargaining Agreement. Paragraph X of the petition states (R. 3):

"By reason of the premises petitioner has been deprived of his right, pursuant to said Agreement, to continue in the active service of defendant as a locomotive engineer since December 30, 1954. . . ."

This is still his position. The collective bargaining Agreement is the product of negotiation. Some things are reserved while others are conceded as a quid pro quo for rights and benefits given in return. The sole question in this case has been whether the Chief Surgeon's findings are reviewable by a three-doctor board arbitration or are limited by the seniority and discharge-for-cause provisions of the Agreement. The Petitioner's attempt to inject the idea of a dispute apart from the interpretation or application of the Agreement cannot be supported. At the instance of Petitioner the Adjustment Board interpreted the Agreement as restricting the right of disqualification for physical disability only if the same was carried out in bad faith. No claim or showing of bad faith was made herein. Under Petitioner's new theory, if some action is permitted by or not restricted in the Agreement, the claim based upon interpretation may be abandoned and a limitation may thereupon be imposed on an independent "resolution of disputes" theory. For example, if the Agreement did not provide for a paid vacation or sick leave period, an employee who nevertheless wanted these features could seek to have them added to the Agreement by the Adjustment Board under the guise of settling disputes. This would circumvent the collective bargaining process. In 1959 these parties negotiated a medical arbitration provision to become a part of the seniority rule (R. 17-19). If it had already become a part of the Agreement as a result of a compulsory settlement of a minor dispute, there would have been no consideration for the 1959 amendment.

An additional argument of the Petitioner, at pages 42 and 43 of his brief, is that it is improper to reject Board awards which are too vague or indefinite or of insufficient finality. The Petitioner's first enforcement suit on the Award of October 2, 1956, (R. 5-8) is cited as having re-

sulted in unwarranted rejection in this manner. *Gunther v. San Diego & A. E. Ry.*, 161 F. Supp. 295 (S.D. Cal. 1958). If this is a valid argument in the instant situation, the Petitioner should have appealed from that judgment. Since the October 8, 1958, "Interpretation" and order (R. 9-11) was issued and in the hands of Petitioner before entry of the judgment in the first *Gunther* case on April 8, 1959 (R. 24), there is every reason to hold that the former suit is decisive of the case at bar under the doctrine of res judicata. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Angel v. Bullington*, 330 U.S. 183, 193 (1947); and 6 *Moore's Federal Practice*, 2d Ed., p. 2258. SD&AE raised this point by its first motion in the District Court and it was denied on March 27, 1961 (R. 24-31). The proceedings had been stayed on Petitioner's motion on July 14, 1958, until February 16, 1959, to give him the opportunity to obtain an interpretation of Award 17646 or a supplemental award from the Adjustment Board (R. 56, 25). Nevertheless the "Interpretation" (second) Award 17646 was not presented to the District Court prior to final judgment or at all until September 26, 1960, when the instant petition was filed. If the award in the first case was vague or indefinite as he contends, Petitioner had more than five months' time remaining in those proceedings during which he could have removed any such infirmity by introducing the Interpretation.

In this case the question is not whether an award should be enforced despite the Board's use of some inept or uncertain terms. The instant award clearly interprets the Agreement (R. 6) and declares the issue to be the good faith of the carrier. Then in an apparent effort to delegate the responsibility for decision, the Board submits a different question—physical condition as it was two years earlier—to a three-doctor arbitration panel. The statute declares that the findings of the Board are to be prima facie evidence

of the facts stated therein. (45 U.S.C. § 153, First (p)). The dispute here was whether the Agreement limited SD&AE's right to rely on the Chief Surgeon's disqualification of Petitioner. The facts stated in the award are that it did not so limit SD&AE provided that the action and reliance were in good faith; otherwise there was a wrongful removal from service (R. 6). These findings of fact are not vague or uncertain. Since the statute gives them efficacy, they should be recognized as the proper interpretation of the Agreement. The order is simply a form incorporating the findings (R. 8, 11). The additional fact, viz. the finding of a three-doctor arbitration panel that Petitioner had no disqualifying defects, cannot be given weight under the statute because that fact is immaterial to the interpretation of the Board. Even if it had been a material fact, the Board exceeded its jurisdiction in substituting arbitration for the Chief Surgeon's determination.¹⁰ The decisions of the Courts below were correct in rejecting the Board's attempt to remodel the agreement of the parties.

Petitioner's reference to *Hodges v. Atlantic Coast Line R.R.*, 310 F.2d 438 (5th Cir. 1962), (Pet. Br. 43), indicates that the Court of Appeals reversed the dismissal of a petition to enforce a board award requiring a three-doctor panel, stating that it was error to dismiss the case outright for lack of definiteness. The *Hodges* case was cited in the Petition for a Writ of Certiorari (in the case at bar) as being in conflict with the decision of the Court of Appeals for the Ninth Circuit below. The circumstances of the two cases are different. The District Court dismissed the *Hodges*

10. Petitioner's comment that SD&AE "acquiesced in the Board's first order by participating in the selection of a three-physician board" (Pet. Br. p. 54) would not suffice to deprive SD&AE of its statutory right to judicial review of the Board award under Section 3, First (p) R.L.A., *Washington Terminal Co. v. Boswell*, 124 F.2d 235 (D.C. 1941), aff'd by an equally divided Court in 319 U.S. 732.

petition under FRCP Rule 12(b)(1) because the award did not deny or sustain a claim (199 F.Supp. 794,—N.D. Ga., Newman Div., 1961). There were no affidavits or exhibits and the court acted on the complaint and annexed award. The first *Gunther* case (161 F. Supp. 295) also consisted of the petition and annexed award but the similarity between the two cases ends at that point. In the first *Gunther* case, the Petitioner requested and was given a delay in the summary judgment proceedings from July 15, 1958 to March of 1959 in which to obtain an "Interpretation" or supplemental award (R. 56). The "Interpretation" was issued October 8, 1958 (R. 9-11). While it was not submitted to the Court in the ensuing five-month period, the circumstances show that Petitioner himself is estopped to claim that the October 2, 1956 award was definite enough for enforcement. In any event, there was no appeal from the Judgment of April 8, 1959.

There are more basic differences between the case at bar and *Hodges* (310 F.2d 438), *supra*. Foremost is the fact that the Adjustment Board in *Hodges* interpreted the collective bargaining agreement as having been violated when the claimant was withheld from service (310 F.2d 441) (Footnote 4). Noting that *Hodges* had never had a physical examination to establish a date from which to assess a back pay penalty, the Board ordered a physical examination with an appeal to a three-doctor arbitration panel. In *Gunther*, the Board made no determination that SD&AE had violated the Agreement. No claim of bad faith was ever made or found by the Board or asserted by Petitioner in the courts below. There was no Agreement violation, and the case is not similar to *Hodges*. A glance at the quotation from *Hodges* (Pet. Br. 44) will disclose that the Court ordered the effectuation of "medical examina-

tions for use by the Adjustment Board". Even if the Court was correct, the quotation does not provide for the substitution of the judgment of the medical arbitration panel for that of the Adjustment Board.

The Court of Appeals in *Hodges* simply required the parties to comply with an order for a medical examination "for use by the Adjustment Board", saying (310 F.2d 438, 443, 444):

"... Again, without indicating any prejudgment, it was certainly permissible for the Adjustment Board to determine physical fitness and utilize medical experts making up the equivalent of a medical arbitration decision. But we do not think that, in the absence of contract provisions establishing such a scheme, the Railway Labor Act has allowed the Adjustment Board by the provisions of an award to commit the ultimate decision of the case to such an outside agency."

"... Such a procedure also assures that when and as the medical arbitration report is evaluated and applied by the Adjustment Board, the enforcing court can then determine the validity of the award based in part on such report. Thus, this determination may include questions whether the underlying collective bargaining agreement either restricts the carrier in the discharge of employees for suspected physical unfitness or the means by which management decision is to be determined or tested. After many years of juridical travail, that was the end result in *Gunther v. San Diego & Arizona Eastern Ry.*, supra, in the final decision. D.C., 198 F. Supp. 402."

It is clear that the *Hodges* case does not decide any issue pertinent to the instant case.

Similarly, the case of *Kirby v. Pennsylvania R.R.*, 188 F.2d 793 (3rd Cir. 1951), is referred to by Petitioner as being receptive to the enforcement of vague or indefinite

Board awards. But unlike the award in the case at bar the Kirby award contained a finding "that defendant violated the rules agreement" (188 F.2d 795). The Court continued on page 796 as follows:

"... But it [Congress] has protected the party who lost before the Board from having unfair advantage taken of him by making the findings of the Board prima facie only. The loser must go forward with attacking proof; but the facts are not conclusively established by the findings."

In *Railroad Yardmasters v. Indiana Harbor Belt R.R.*, 166 F.2d 326, 329 (7th Cir. 1948), the court affirmed the lower court's dismissal of an enforcement proceeding under Section 3, First (p) of the Act on two grounds, one of which was that "there are no facts disclosed in these so-called findings upon which an award could be based." The claim was that two yardmen had been improperly granted seniority rights, thus depriving two regular yardmasters of their standing. At page 330, the court declared:

"We are of the view that it cannot reasonably be held that the award and findings in the instant case are sufficiently definite and certain as to make a prima facie case in favor of the plaintiff. *Plaintiff necessarily cannot rely upon the findings and award but must offer additional proof in support of the allegations of its bill.*" (Emphasis added.)

III. Petitioner Cannot Ignore the Basic Difference Between Consensual Arbitration and the Statutory Provisions for the Enforcement of Board Awards.

Commencing at page 37 of his brief, Petitioner argues that recent Supreme Court decisions beginning with *Textile workers v. Lincoln Mills*, 353 U.S. 448 (1957), have established rules of law which, applied to the facts of this case,

require reversal of the judgments below and remand to the District Court for the trial "de novo" provided for by Section 3, First (p), of the Railway Labor Act (45 U.S.C. § 153, First (p))—reproduced in App. A to Pet. Br., pp. xv-xvi).

It is further his position that pursuant to the federal law the Adjustment Board findings are to be equated to those of an arbitration board established specifically by the parties in collective bargaining to fully and finally resolve all disputes under an agreement which includes a no-strike clause. At page 52 of his brief, Petitioner concludes that under the applicable federal law this enforcement action is based upon the Congressional mandate contained in Section 3, First (p), "... on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated" and the decisions of this Court commonly referred to as the Steelworkers Trilogy.¹¹ His conclusion is that when the findings of the Adjustment Board are thus applied, the trial "de novo" would be limited to the determination "on the basis of the evidence adduced, whether as of December 30, 1954, Petitioner was physically qualified to perform the duties which SD&AE required of its locomotive engineers" (Pet. Br. 55).

The thrust of Petitioner's argument is that the findings and order in the instant case should be accorded the most favorable features of Section 3, First (p), and of consensual arbitration.

Whatever intendments are indulged in favor of arbitration awards, the statutory procedure under Section 3, First

11. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

(p), must be respected to protect the rights of the parties and should be distinguished from arbitration under Sections 7, 8 and 9 of the Railway Labor Act (45 U.S.C. §§ 157, 158, 159) which demonstrate a Congressional intent to provide an entirely different scheme for resolving disputes from the procedure in Section 3, First (p).

In *Brotherhood, etc. v. Atlantic Coast Line R.R.*, 253 F.2d 753, 757-58, Chief Judge Parker of the Fourth Circuit, said:

"If it had been intended, as appellant argues, that the orders of the Board rendered pursuant to 45 U.S.C.A. § 153 should have the effect of awards of arbitrators, some such provisions as are contained in 45 U.S.C.A. §§ 158 and 159 which relate to arbitration under 45 U.S.C.A. § 157, would have been provided for their enforcement. The fact that an entirely different provision was made for the enforcement of Board orders under section 153 from that made for enforcement of arbitration awards entered under the existing statute relating to arbitration is a matter which cannot be ignored and which shows clearly that Congress did not intend Board orders to have the effect of arbitration awards."

It is clear that the statutory enforcement procedure is an integral part of the entire statutory process of Section 3, First. In *Washington Terminal Co. v. Boswell*, 124 F.2d 235 (D.C. 1941) (per Rutledge, J.), affirmed by an equally divided Court in 319 U.S. 732, the Court stated (p. 242):

"The entire statutory process has three distinct and primary stages: (1) direct negotiation between the disputants; (2) administrative determination; (3) judicial enforcement. While these are distinct, they are not independent. Each is related to the others as links in a chain or successive steps in a stairway leading to decision."

The Court continued (p. 246):

"In all this there is no essential unfairness. Certainly there is none beyond the power of Congress to create in the regulation of such complex economic matters. The carrier is at full liberty to accept and comply with the award, or to reject and disregard it. If it chooses the latter course, the award has no effect upon its rights unless the employee institutes and succeeds in a suit to enforce it. If he does so, the carrier receives full constitutional protection in the suit."

Similarly in *Union Pacific R.R. v. Price*, 360 U.S. 601 (1959), this Court discussed the contention that since an employee who loses before the Adjustment Board cannot obtain statutory review, he should not be required to submit to the review provided in the Act if he prevails. The Court answered this question as follows (pp. 615-616):

"... The disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicitly created by Congress, and it is for Congress to say whether it ought be removed."

The Supreme Court continued (pp. 616-617):

"... the statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board, past the action under § 3 First (p) authorized against the noncomplying carrier, see *Washington Terminal Co. v. Boswell*, 75 U.S. App. D.C. 1, 124 F.2d 235, *aff'd.* by an equally divided Court, 319 U.S. 732, or the review sought of an award claimed to result from a denial of due process of law, see *Ellerd v. Southern Pacific R. Co.*, 241 F.2d 541; *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F.2d 579, 582. So far as appears, all of the Courts of Appeals and District Courts which have dealt with this problem have reached the conclusion we reach here."

In considering the availability of remedies to the parties in light of the foregoing, it should be noted that the *Washington Terminal* case, 124 F.2d 235, *supra*, rejected the application of the railroad for declaratory relief pending the availability to the employee of an enforcement proceeding under Section 3, First (p). Furthermore, a discharged employee has the right to treat his employment relationship as ended and sue for breach of contract as an alternative to pursuit of the Adjustment Board remedy under Section 3, First (i). *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (1953). It has not been established that any similar remedy is available to railroads.

The cases cited by Petitioner involve the enforcement of agreements to arbitrate under Section 301 of the Labor Management Relations Act, 1947 (29 U.S.C. § 185). This is a very different matter than the enforcement of awards under Section 3 of the Railway Labor Act. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), cited by Petitioner in this context, involved a non-railroad collective bargaining agreement containing a no-strike clause and a grievance procedure culminating in the arbitration of disputes. Suit was brought by the union under Section 301 of the Labor Management Relations Act, 1947 (29 U.S.C. § 185), to compel arbitration. This Court held that an agreement to arbitrate disputes when contained in the collective bargaining agreement should be specifically enforced. The common-law rule against the enforcement of executory agreements to arbitrate was rejected. The provisions of Section 7 of the Norris-LaGuardia Act (29 U.S.C. § 101, et seq.), were held inapplicable because the Congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes was clear. The policy was reiterated in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *supra*, another case involving a suit to compel arbitration of

a grievance under Section 301(a), Labor Management Relations Act, 1947 (29 U.S.C. § 185). The Court held that in a suit under Section 301(a), judicial inquiry must be confined to the question whether the reluctant party did agree to arbitrate the grievance or gave power to the arbitrator to make the award, with doubts being resolved in favor of coverage. This Court said: "*For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.*" (363 U.S. 574, 582.) (Emphasis added.) Two other similar cases mentioned above are *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960), and *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), both of which likewise deal with the federal policy in connection with arbitration in the non-railroad field. The *Enterprise Corp.* case held that it is improper for courts to review the merits of an award under an arbitration agreement, and the following general discussion appears at 363 U.S. 597:

"... Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

Even where the parties have consented to arbitration, the award cannot exceed the proper bounds of interpretation and application of the collective bargaining agreement. If it does the courts will not enforce the award in a Section 301 (L.M.R.A.) case.

At page 51 of his brief, Petitioner discusses the attempt to extend to suits under Section 301, L.M.R.A., the rationale

of two cases involving railroad employees, *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941), and *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (1953), so that state law would control suits for severance pay. In *Republic Steel Corp. v. Maddox*, 13 L.Ed. 2d 580, 582-83 (1965), this Court renounced such an extension, pointing out that even in the *Moore* and *Koppal* cases it is the federal law rather than state law which requires compliance with the grievance procedures. It should be noted that the *Moore* and *Koppal* cases were not enforcement suits under Section 3 of the R.L.A. The *Maddox* case holds that the application of federal law to severance claims in Section 301(a), L.M.R.A. cases requires the exhaustion of the grievance procedures under the contract, including agreed arbitration.

Petitioner cites an airline case, *Machinists v. Central Airlines*, 372 U.S. 682 (1963), which, like the Section 301 cases, concerns an agreed arbitration provision under Section 184, R.L.A. The air carriers are subject to the Railway Labor Act, but are excepted from Section 3 which deals with the Adjustment Board (372 U.S. 685). The Section 184 contract is likewise governed and enforceable by federal law rather than state law. The statutory procedure of Section 3, First, R.L.A., differs from the agreed arbitration involved in the foregoing cases. None of the cases discussed in Petitioner's brief justify or support his contention that the right and duty of SD&AE in good faith to disqualify locomotive engineers who are physically unable to discharge their duties safely was arbitrable. Federal law would not substitute arbitration provisions where none existed. The Adjustment Board does not have jurisdiction either to impose upon the parties an arbitration procedure without their consent or to delegate to others its decision-making authority.

IV. Recent Decisions in Railroad Cases Strongly Support the Judgments Below.

At page 40, Petitioner alludes to the question of review of the instant award in light of the decision in *Locomotive Eng'rs v. Louisville & N. R.R.*, 373 U.S. 33 (1963) which dealt with the review aspects of money awards. This proceeding is predicated on Section 3, First (p), by the Petition herein. It is not urged herein that a trial "de novo" should be refused. Petitioner would limit the trial, however, by his contention, discussed above, that the probative value of the Board's findings should preclude determination by the court of the "underlying rights and duties of the parties". He states that evidence should be adduced to determine "whether, as of December 30, 1954, petitioner was physically qualified to perform the duties which SD&AE required of its locomotive engineers" (Pet. Br. p. 55). In any event the demand for back pay herein represents a claim for money for each day in which Petitioner considers himself improperly withheld from service as a locomotive engineer. This is precisely the same as a claim of an engineer for a "runaround" (error of the railroad in calling someone else for service when a particular engineer had a prior right to be called to perform the same service). Such a claim would also be for money each day in which the engineer was similarly not called for service. There is a striking similarity between the instant award in its present posture and the award in *Locomotive Eng'rs v. Louisville & N. R.R.*, 373 U.S. 33 (1963), mentioned above. In that case, as in this one, the locomotive engineer's claim was that he was wrongfully withheld from service; and he demanded reinstatement with back pay. There, he had been reinstated and the remaining claim was for money. Here, he was entitled to reinstatement if he had simply requested examination by the three-doctor arbitration panel adopted in his Agreement in 1959 and satisfactorily passed the physical exami-

nation thereunder (R. 17-19). Yet, the record contains no indication that he ever requested or demanded such an arbitration. It is his own failure to seek reinstatement under that Agreement provision which has kept him out of active service if he is correct in saying that it would be safe for him to operate locomotives in his physical condition at the particular time. This is true despite the continuance of the instant enforcement suit, which refers to the integrity of the Chief Surgeon's decision of 1954.

The right of Petitioner to seek redress for any improper failure of SD&AE to return him to service was altered by agreement of the parties to adopt the 1959 provision for a three-doctor panel. Both the SD&AE and Mr. Gunther are bound by the new provision which actually amounts to an addition to the grievance procedure under the applicable contract. He has failed to exhaust that procedure in relation to any claim on his part of wrongful prevention from return to active service. The pendency of the instant suit, relating to the time before this grievance procedure was in effect, does not distinguish his position as an engineer under the Agreement from the situation where he had been reinstated in settlement of this suit and thereafter in 1959 (after the effective date of the provision for arbitration) had again failed a routine examination by the Chief Surgeon. He would have to exhaust the grievance procedure. *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (1953); *Barker v. Southern Pac. Co.*, 214 F.2d 918 (9th Cir. 1954). This he did not do. The foregoing is a complete defense to the instant case—at least with respect to the period since 1959.

The *Gunther* award is likewise similar in many respects to the recent case entitled *Russ v. Southern Ry.*, 334 F.2d 224 (6th Cir. 1964). *cert. denied*, 379 U.S. 991, *rehearing denied* in 380 U.S. 938. In that case the Court of Appeals

reversed the District Court's order of enforcement of an Adjustment Board award which had found that a locomotive engineer should be reinstated and paid for time lost. At page 227, the Court stated:

"An award which does not contain an order for the payment of money is final and binding on both parties to a dispute. *Brotherhood of Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U.S. 33, 40, 83 S.Ct. 1059, 10 L.Ed.2d 172; *Brotherhood of R.R. Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622.

"It is clear, however, from the express language of the statute, that money awards of the Board are not final and binding, but the railroad may appeal therefrom to the District Court and obtain a de novo hearing. *Washington Terminal Co. v. Boswell*, 75 U.S.App. D.C. 1, 124 F.2d 235, affirmed by a divided Court in 319 U.S. 732, 63 S.Ct. 1430, 87 L.Ed. 1694; . . ."

At page 228 the Court continued:

"We find nothing in the agreement or in the Act which limited the right of the railroad to discharge an employee for cause. In the absence of a statute or an agreement, an employer may discharge his employee for cause or without cause. Violation of a rule certainly justified a discharge even for cause. 56 C.J.S. *Master and Servant* § 28(49) p. 219.

"The Board would not be justified in ordering reinstatement without a finding that the discharge was wrongful, *Thomas v. New York, Chicago & St. L. R. Co.*, *supra*; *Tinnon v. Missouri Pacific R. Co.*, 282 F.2d 773 (C.A.8).

"The Board made no such finding here."

See, in accord, *Brotherhood of Railroad Trainmen v. Louisville & N. R. Co.*, 334 F.2d 79 (5th Cir. 1964), *cert. denied*, 379 U.S. 915 (1965), *rehearing denied*, 379 U.S. 986 (1965).

V. The District Court's Denial of Relief Under FRCP Rule 60(b) Was Proper.

There was no abuse of discretion in the District Court's refusal to reopen the judgment some eight months after its entry. The District Court's opinion denying the motion shows that every reasonable consideration was given to the motion (R. 207-218). The order was dated April 10, 1963 (R. 218-219). The pertinent facts are set forth above in Respondent's statement of the case.

As Petitioner states at page 56 of his brief, the evidence sought to be introduced consists of certain letters written in 1944 and 1947, which he now asserts had the effect of amending the Agreement to provide for a three-doctor medical arbitration review of the Chief Surgeon as to the physical fitness of locomotive engineers to continue in active service (R. 143). The letters provide that the interpretation of rules in the BofLE Agreement with Southern Pacific Company covering locomotive engineers will apply to "similarly worded rules" in the BofLE Agreement with SD&AE, but no such latter rules were shown to exist (R. 216-217). No "similarly worded rules" were shown to exist in the printed booklet Agreement of 1938 (green cover; R. 15—documentary exhibit attached to page 266 of original record) (R. 210, 215). Furthermore, Mr. Colyar, General Chairman of BofLE, to whose affidavit Petitioner refers, declares that each time the Agreement is printed it includes all of the intermediate letter agreements and understandings since the last printing (R. 106-107). The next subsequent printing after 1938 was two years after Mr. Gunther's disqualification, viz. 1956, when an orange-covered booklet was printed (R. 215). This printed Agreement did not contain the alleged rule for a three-doctor arbitration panel (R. 215). The Court asked counsel for Petitioner why the

rule was not in the printed Agreement of 1956, and the reply was that "A reasonable inference to be drawn for its omission from the orange-covered booklet as of January 1, 1956, is that it was inadvertently omitted by those charged with the responsibility of seeing that all existing contractual provisions were incorporated there" (R. 215). The evidence of record, however, affirmatively shows that those charged with this responsibility comprehended its absence from the Agreement (R. 194-203). Mr. Colyar himself was the author of the 1955 letter to SD&AE (R. 194-203) proposing the reprint which became effective in 1956 (orange-covered booklet) and advising that the Agreement should be brought up to date and detailing the interim settlements since 1938 (R. 195). Article 35 is the seniority rule in the Agreement to which the three-doctor arbitration panel was added in 1959 (R. 17-19). The words "Article 35—No Change" appear in Mr. Colyar's letter of 1955 detailing the changes to be made (R. 20). This is commented upon in the affidavit of Mr. K. K. Schomp in opposition to the motion (R. 176-177). It thus appeared that the inference or supposition that the 1944-1947 letters might have been inadvertently omitted was without foundation in light of the specific facts of record.

Even if it could be contended that the proffered letters did in fact apply to a "similarly worded rule" and were inadvertently omitted, there is no basis whatever for a finding that Petitioner exercised "due diligence" in searching for them. He commenced the first action (161 F.Supp. 295) predicated upon the 1956 award in 1957 and was requested many times by the Court, prior to judgment in 1959, to bring in evidence of any restrictions on the SD&AE right to disqualify engineers for physical reasons (R. 28-30). Again in the instant action, which was filed in 1960, the Court repeatedly admonished Petitioner to introduce or

point to such evidence (R. 56, 214-215). Petitioner was thoroughly familiar with the Agreement, practices and customs and represented fellow employees in applying the Agreement (Pet. Br. 21, para. 6). Yet no effort seems to have been made to comply with the requests of the District Court over a period of years, if indeed such an Agreement provision existed. The Adjustment Board noted no such limitation in its purported award and "Interpretation" (R. 5-11). Additionally, since the BofLE has represented Mr. Gunther in this case since at least six months before it was filed in September of 1960, it is not an excuse to say that union differences kept the information away from Petitioner (R. 168-170). It should be noted that, despite all of the foregoing, there are available adequate discovery processes to develop such facts if they do exist.

It is submitted that under the circumstances the Court's discretion on the FRCP Rule 60(b) motion was properly exercised.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below are correct and proper and should be sustained and affirmed.

Dated: October 20, 1965.

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(Appendix A follows)

Appendix A

RAILWAY LABOR ACT, SECTION 6 (45 U.S.C. § 156)

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 27

F. J. GUNTHER,

Petitioner,

vs.

**SAN DIEGO & ARIZONA EASTERN
RAILWAY COMPANY,**

Respondent.

**On Writ of Certiorari to the United States Court of Appeals
For The Ninth Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
AND BRIEF OF THE RAILWAY LABOR EXECUTIVES'
ASSOCIATION AS AMICUS CURIAE.**

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Dated at Toledo, Ohio, this
21st day of September, 1965

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Dated at Toledo, Ohio, this
21st day of September, 1965

IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 27

F. J. GUNTHER,

Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN
RAILWAY COMPANY,

Respondent.

**On Writ of Certiorari to the United States Court of Appeals
For The Ninth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Railway Labor Executives' Association respectfully moves the Court for leave to file a brief as *amicus curiae* in the above entitled action, consent to the filing of such brief having been requested from the parties hereto, and having been refused by the respondent.

The Railway Labor Executives' Association is a voluntary unincorporated association, with which are affiliated the following standard national and international railway labor organizations:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employees

Brotherhood Railway Carmen of America
 Brotherhood of Railroad Signalmen of America
 Brotherhood of Railway and Steamship Clerks,
 Freight Handlers, Express and Station Employees
 Brotherhood of Railroad Trainmen
 Brotherhood of Sleeping Car Porters
 Hotel & Restaurant Employees and
 Bartenders International Union
 International Brotherhood of Boilermakers, Iron
 Ship Builders, Blacksmiths, Forgers and Helpers
 International Brotherhood of Electrical Workers
 International Brotherhood of Firemen & Oilers,
 Helpers, Roundhouse & Railway Shop Laborers
 International Organization Masters, Mates & Pilots
 of America
 National Marine Engineers' Beneficial Association
 Order of Railway Conductors and Brakemen
 Railway Employees' Department, AFL-CIO
 Railroad Yardmasters of America
 Seafarers' International Union of North America
 Sheet Metal Workers' International Association
 Switchmen's Union of North America
 Transportation-Communication Employees Union

The principal office of said association is located at 400
 First Street, N. W., Washington, D. C.

The foregoing organizations affiliated with the Railway
 Labor Executives' Association represent, for purposes of
 collective bargaining under the Railway Labor Act, the bulk
 of the nation's rail employees. Each of said affiliated organi-
 zations is a party to collective bargaining agreements be-
 tween it and most of the railroads in the United States,
 governing the rates of pay, rules and working conditions

of said employees. Said organizations are under a statutory duty to exert every reasonable effort to make and maintain such agreements and to settle all disputes, whether arising out of the application of such agreements or otherwise. It is their further function under the statute to provide for the selection and compensation of the labor members of the National Railroad Adjustment Board, the administrative tribunal created by the Act for final determination of disputes growing out of grievances or out of the interpretation and application of such agreements which cannot be settled on the property of the carrier or carriers involved.

The fairness and effectiveness of the statutory procedures for the settlement of such disputes is thus of direct and vital concern to these organizations. The issues in this case place squarely at stake the ability of these organizations to continue to fulfill their aforementioned statutory duties, through utilization of the procedures for settlement of disputes and grievances which were established by the Railway Labor Act in an effort to obviate the constant industrial strife which prevailed when the only alternatives for resolving such matters were economic warfare or vexatious and prohibitive litigation.

The decision of the court below is the most recent of a series of lower federal court decisions refusing to accord finality to the awards of the National Railroad Adjustment Board, and expressly rejecting, with respect to railroad employees, the concept of compulsory arbitration of minor labor disputes. Such decisions, in subjecting railroad employees to the vicissitudes of completely relitigating claims upon which they have prevailed before the Board, represent a complete frustration of the Congressional aim of expeditious settlement of railroad labor disputes through

their submission to specialized administrative tribunals, with a minimum of intervention by the courts.

While we understand that the petitioner herein will present compelling arguments supporting the Board's award on the merits, on the basis of the record herein, we believe that the question of the right of the courts to review such awards on the merits at all, instead of according them the status and effect of arbitration awards, is of such far-reaching importance to the future of railroad labor relations as to justify independent presentation of the views of an organization which may fairly be said to represent railroad labor as a whole.

Respectfully submitted,

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**BRIEF OF RAILWAY LABOR EXECUTIVES'
ASSOCIATION AS AMICUS CURIAE**

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**BRIEF OF RAILWAY LABOR EXECUTIVES'
ASSOCIATION AS AMICUS CURIAE**

**PRELIMINARY STATEMENT — INTEREST OF
THE AMICUS CURIAE**

The decision of the court below, as well as those of other lower federal courts in recent cases involving refusal of carriers to comply with awards of the National Railroad Adjustment Board, have operated to completely frustrate the expeditious and fair settlement of so-called "minor disputes" in the railroad industry, through the statutory procedure which this Court has repeatedly described as compulsory arbitration. The unlimited opportunity afforded

carriers to completely relitigate disputes previously submitted to and decided by the Board not only prolongs their ultimate resolution, but defeats the objective of uniform interpretation of labor agreements in the railroad industry by an administrative tribunal composed of members having particular expertise in their field. And the inequity of a system of adjudication denying employees any opportunity for review of an adverse decision at the Board level, but affording carriers a completely new trial on all awards favoring the employees, is glaringly apparent.

The issues involved in this case are thus of vital concern to the organizations affiliated with the Railway Labor Executives' Association, on whose behalf this brief as *amicus curiae* is presented. As parties to collective bargaining agreements with most of the railroads in the country, said organizations have been increasingly frustrated in their ability to perform their statutory functions as bargaining representatives, by the situation created by decisions of the court below and other lower federal courts which have accepted the principle of complete trial *de novo*, on the merits, in actions to enforce awards of the Adjustment Board.

While this Court has not passed directly on the question of the scope of review of awards of the Board which is open to carriers in statutory enforcement actions, the principles which it has developed in a series of related cases under the Railway Labor Act are clearly at odds with the ruling of the court below. Thus this Court has found that railroad employees gave up the right to strike over grievances and contract claims in exchange for the system of compulsory arbitration of those minor disputes by the

Adjustment Board; that the Board's jurisdiction over those disputes is exclusive; that an employee whose claim is denied by the Board can obtain no review whatsoever on the merits of its decision; that nonmoney awards of the Board are final and binding; that in awards favoring employees the monetary aspects of the awards present issues wholly separable from the merits of a wrongful discharge claim; and that it was reserving for consideration in an appropriate case the question of the proper scope of review of monetary awards.

The decision of the court below is completely at odds with these principles. It accorded the carrier, respondent here, a complete review *de novo* on the merits of petitioner's claim for reinstatement; held that the Board's jurisdiction was limited to entertaining strict breach of contract claims, in spite of the statutory provision giving it jurisdiction over "grievances" as well; held that the Board could not consider custom and practice in connection with the contract claim, in spite of clear decisions of this Court to the contrary; disagreed with the Board's ruling as to the effect of particular provisions of the contract, holding that employees denied employment on grounds of physical disqualification had no right to challenge the fact or validity of such disqualification under contract provisions against discharge without just cause; and reversed the decision of the Board on the merits without even reaching or considering any monetary aspects of the award.

ARGUMENT

AWARDS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD ARE FINAL AND BINDING ON THE MERITS OF DISPUTES SUBMITTED TO IT, AND ARE REVIEWABLE ONLY WITH RESPECT TO THEIR MONETARY ASPECTS IN ACTIONS SEEKING THEIR ENFORCEMENT.

Section 3, First (m) of the Railway Labor Act (45 U.S.C. § 153, First (m)) provides as follows with respect to awards of the National Railroad Adjustment Board:

“The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, *and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.* In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.” (Emphasis supplied.)

The question of the interpretation of Section 3, First came before this Court in *Brotherhood of Railroad Trainmen, et al v. Chicago River & Indiana Railroad Company, et al*, 353 U.S. 30, 1 L. Ed. 2d 622 (1957). The Court considered the language of Section 3, First (m) of the statute and concluded that such language *unequivocally* made decisions of the Adjustment Board “final and binding” on both parties. The Court’s findings on this point read as follows:

"Section 3, First (m) declares that

" 'The awards of the several divisions of the Adjustment Board . . . shall be final and binding upon both parties to the dispute. . . . '

"This language is unequivocal. Congress has set up a tribunal to handle minor disputes which have not been resolved by the parties themselves. Awards of this Board are 'final and binding upon both parties.' And either side may submit the dispute to the Board." *Id.*, 353 U.S. at 34.

The Court then reviewed the legislative history of Section 3 and concluded that it was well understood by everyone concerned that the section provided for a system of *compulsory arbitration*. The Court summed up its conclusions on this legislative history as follows:

"This record is convincing that there was a general understanding between both the supporters and the opponents of the 1934 amendment that *the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field*. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history." (Emphasis added.) *Id.*, 353 U.S. at 39.

The Court further determined that the Norris-LaGuardia Act, 29 U.S.C. § 101, did not preclude the federal courts from issuing injunctions against strikes over such disputes, holding that while Congress in enacting Norris-LaGuardia had "acted to prevent the injunctions . . . from upsetting the natural interplay of the competing economic forces of labor and capital," the compulsory arbitration processes established by the Railway Labor Act were such that controversies subject to these processes "are not the

same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative." *Id.*, 353 U.S. at 40-41.

To review the award of the Adjustment Board on the merits would completely negate the legal theory of an "arbitration" and render meaningless the Court's finding that Section 3 proceedings are a form of "compulsory arbitration" provided as a "reasonable alternative" to labor's right to strike.

That the awards of the Board are not merely advisory was plainly stated by the Court in the case of *Union P. R. Co. v. Price*, 360 U.S. 601, 3 L. Ed. 2d 1460 (1959), which held that a discharged employee whose claim for reinstatement had been rejected by the Board could not relitigate the validity of his discharge in an action at law for damages.

In the *Price* case, as in *Chicago River*, *supra*, the Court again reviewed the legislative history of the Railway Labor Act at considerable length, in its discussion of the Congressional intent in providing, in Section 3, First (m) of the Act, that awards should be "final and binding," and reached the following conclusion:

"Plainly the statutory scheme as revised by the 1934 amendments was designed for *effective and final decision of grievances* which arise daily, principally as matters of the administration and application of the provisions of collective bargaining agreements." *Id.*, 360 U.S. at 616. (Emphasis supplied.)

The dissenting Justices in the *Price* case and in the case of *Pennsylvania R. Co. v. Day*, 360 U.S. 548, 3 L. Ed.

2d 1422 (1959), decided the same day, urged a number of lower court decisions which had granted *de novo* review of awards (see *Day* case, 360 U.S. 556-557 n. 4) in support of the conclusion that the construction accorded the statute by the majority of the Court resulted in an unconstitutional disparity between employees and carriers, in that the latter could obtain a court review on the merits of adverse awards, whereas the former would be concluded by the Board's decision, without any review at all.

It is apparent that the force of the dissenting opinion in the *Day* case rests upon the assumption of the dissenting Justices that the majority of the Court, "without so much as discussing it," shared the view of the dissenters that the previous lower court cases allowing carriers a trial *de novo* were correctly decided, and that the statute did in fact afford a complete review on the merits to a railroad defending an action to enforce an award. If this assumption be incorrect, then the unconstitutional disparity of treatment of employees and carriers, relied upon by the dissenting Justices, disappears.

We submit that the conclusion is inescapable that the majority of the Court in *Price* and *Day* did not so intend to limit their decision as to the final and binding effect of the Board's determinations, or to approve a construction of the statute which would afford carriers a review on the merits of awards adverse to them while denying it to employees.

The fact that the decision in the *Price* case recognizes that "some" opportunity for a review is accorded to carriers by virtue of the exception in Section 3 First (m) of the statute to the effect that awards will not be final and

binding "insofar as they shall contain a money award" does not militate against this conclusion. *Id.*, 360 U.S. at 614-5. The exception by its terms is not directed at *all* findings of the Board in awards which incorporate directions for the payment of money, but is limited to the money features alone. Congress said only that awards would not be final and binding "insofar as" they should contain a money award. Thus, the *amount* of money due and its allocation among the beneficiaries is the only factor which is not accorded finality and which is open to independent investigation by the Court in an enforcement action. These are facts which generally cannot be determined finally until the award is complied with. The other aspects of such an award—the merits of grievances and determinations as to the rights and obligations of the parties under the applicable collective bargaining agreements—are entrusted for final and conclusive determination to the expertise of the specialized administrative tribunal. To put it another way, the Board's determination of the question of "liability" is final and binding on all parties, and only the ascertainment of "damages," a matter not foreign to the normal business of the courts, or requiring any administrative expertise, or involving the policy considerations of uniformity of interpretation of agreements and adjustments of grievances commented on in the *Day* case, 360 U.S. at pages 551-552, is left open for judicial review.

The foregoing conclusions with respect to the purport of the *Price* and *Day* decisions are supported by subsequent decisions of this court dealing with the question of the reviewability of arbitration awards. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 4 L. Ed. 2d 1403; *United Steelworkers v. Warrior & G. Nav. Co.*, 363 U.S. 574, 4 L.

Ed. 2d 1409; and *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 4 L. Ed. 2d 1424. These cases are relevant here both because of the Court's previous unequivocal statement, in the *Chicago River* and later cases, that the statutory provisions dealing with the Adjustment Board "were to be considered as compulsory arbitration," and because of the Court's recognition of a Congressional policy favoring final and binding arbitration of labor disputes arising from grievances or from the interpretation or application of collective bargaining agreements.

The *Enterprise* case presents a close parallel to the instant one, being an action to enforce an arbitration award. It is also significant because of the separate treatment accorded the money feature of the award, the Court ordering compliance with that part of the award calling for reinstatement of discharged employees, but withholding its approval of the monetary portion pending further proceedings.

In the face of the principles enunciated by the Court with respect to the binding effect of an arbitration award in an enforcement action, the contention that a defendant may relitigate questions of interpretation and application of agreements and grievances decided by the Adjustment Board presents such a widely differing concept of the effect of the Board's award as to render the term "arbitration" completely inappropriate to describe the Board procedure.

That such a concept is directly opposed to that enunciated in the *Price* case is, we submit, well illustrated by the fact that on the same day that it decided the *American Mfg. Warrior & Gulf*, and *Enterprise* cases, the Court, in *Brotherhood of L.E. v. Missouri-Kansas-T. R. Co.*, 363 U.S.

528, 4 L. Ed. 2d 1379 (1960) in discussing disputes of the sort referable to the Adjustment Board, again recognized "the superseding purpose of the Railway Labor Act to establish a system of *compulsory arbitration* for this type of dispute. . . ." *Id.*, 363 U.S. at 531. (Emphasis supplied.)

The intent of the statute to foreclose relitigation of the merits of Adjustment Board awards, and to permit review, in the enforcement action, only of their monetary aspects, is further supported by the opinion in the recent case of *Locomotive Engineers v. Louisville & N. R. Co.*, 373 U.S. 33, 10 L. Ed. 2d 172 (1963), where the Court said:

"The several decisions of this Court interpreting Section 3 First have made it clear that this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes."

.
"... We do not deal here with nonmoney awards, which are made 'final and binding' by Section 3 First (m). The only portion of the award which presently remains unsettled is the dispute concerning the computation of Humphries' 'time lost' award, *an issue wholly separable from the merits of the wrongful discharge issue.* . . ." *Id.*, 373 U.S. at 38, 40-41. (Emphasis supplied.)

Finally, in its very recent opinion in the case of *Republic Steel Corp. v. Maddox*,U.S....., 13 L. ED. 2d 580 (January 25, 1965), the Court reiterated the existence of a federal policy favoring arbitration of railway and other labor disputes; discussed previous decisions which had upheld the right to judicial determination of railroad labor disputes (*Moore v. Illinois Central R. Co.*, 312 U.S. 630 (1941),

and *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (1953)); and indicated that in the light of the recently developed doctrine of substantive federal law governing collective bargaining agreements and favoring arbitration of disputes thereunder, the reasoning of the *Moore* and *Koppal* cases was probably no longer sound, saying, "Thus a major underpinning for the continued validity of the *Moore* case in the field of the Railway Labor Act has been removed. . . ." *Id.*, 13 L. Ed. 2d at 585.

In the instant case the court below considered and rejected the contention that the federal policy favoring arbitration of labor disputes was applicable to minor disputes in the railroad industry. (R. 232.) Its error in that respect is clearly demonstrated by the *Maddox* case.

In the *Maddox* case, the Court indicated that it was not at that time overruling the *Moore* case, stating:

"Consideration of such action should properly await a case presented under the Railway Labor Act in which the various distinctive features of the administrative remedies provided by that act can be appraised in context, e.g., the make-up of the Adjustment Board, *the scope of review from monetary awards*, and the ability of the Board to give the same remedies as could be obtained by court suit." *Id.* 13 L. Ed. 2d at 586, n. 14. (Emphasis supplied.)

For purposes of our case, the underscored portion of the foregoing quotation is particularly significant. We submit that it clearly supports our conclusion with respect to the import of *Locomotive Engineers v. Louisville & N. R. Co.*, *supra*, to the effect that the awards produced by compulsory arbitration under Section 3, First, of the Railway

Labor Act are equivalent to those produced by labor arbitration generally; that "final and binding" as used in Section 3, First (m), means final and binding on both the carrier and the employees, not just on employees who lose; and that only the fact and amount of damages—the monetary aspects of an award—and not the Board's ruling on the merits of the proper interpretation and application of agreements, may be reviewed by the courts.

CONCLUSION

We submit that *de novo* judicial review of any but the money aspects of awards of the National Railroad Adjustment Board operates to defeat the clear Congressional objectives of expeditious settlement of minor disputes and grievances through compulsory arbitration; uniform and consistent interpretation and application of agreements on the property of a single carrier or, in the case of multi-carrier national agreements, throughout the industry; and the benefits of the Board's expertise gained through practical knowledge of the railroad industry and its customs and usages. The problem is compounded where, as here, a reviewing court attempts to resolve the dispute by applying strict principles of commercial contract law and the common law of master and servant. Moreover, of particular concern to the Association and its component organizations, is the utter unfairness of what amounts to a form of double jeopardy with respect to claims of employees, whereas a Board award in favor of a carrier is immune from further attack.

The need for clarification by this Court of the scope of review of awards of the National Railroad Adjustment

Board is increasingly pressing. The so-called "minor disputes" over the proper interpretation and application of agreements are frequently a major source of friction between management and labor, and involve substantial issues with respect to rights and benefits of large groups of employees. For employees to have to wait for years, as is often the case, before receiving a Board determination of these issues, and then face the prospect of having a favorable award nullified in a *de novo* judicial proceeding, is a source of widespread irritation and frustration.

Recent decisions of this Court confirming the absence of the right to strike to enforce awards, and the exclusive nature of the statutory enforcement procedure, coupled with the doctrine of complete trial *de novo* enunciated by the lower federal courts with respect to the enforcement action, have encouraged many carriers to ignore the Board's awards almost as a matter of course. As a result, litigation such as the instant case is becoming increasingly frequent, and the Congressional objectives which the Board was created to serve are being defeated.

For the foregoing reasons, it is respectfully submitted that the decision of the court below should be reversed, and the case remanded with instructions requiring that the award here involved be accorded final and binding effect on

the merits of the dispute, and that any judicial review thereof be limited to the monetary aspects of said award.

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Dated at Toledo, Ohio this
21st day of September, 1965.

CERTIFICATE OF SERVICE

I, Richard R. Lyman, one of the attorneys for the Railway Labor Executives' Association, as *amicus curiae*, do hereby certify that on the 21st day of September, 1965, I served the attached motion for leave to file brief as *amicus curiae* and brief of *amicus curiae* upon all parties of record herein by depositing copies thereof in the United States mails, via airmail, postage prepaid, addressed to Mr. Charles W. Decker, 45 Polk Street, San Francisco 2, California and Mr. Clifton Hildebrand, 1212 Broadway, Bank of America Building, Oakland 12, California, attorneys for petitioner, F. J. Gunther; Mr. Waldron A. Gregory, General Attorney, Southern Pacific Co., 65 Market Street, San Francisco 5, California and Mr. William R. Denton, Assistant General Attorney, Legal Department, Southern Pacific Co., 65 Market Street, San Francisco 5, California, attorneys for respondent, San Diego & Arizona Eastern Railway Company.

Richard R. Lyman

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 27

F. J. GUNTHER,

Petitioner,

VS.

SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

Objection to Motion for Leave to File Brief Amicus Curiae

The Respondent San Diego & Arizona Eastern Railway Company respectfully submits its objection to the Motion by the Railway Labor Executives' Association (hereinafter referred to as Association) for leave to file a brief as amicus curiae in the above-entitled action upon the following grounds:

1. The interest of Association, as disclosed in the motion, is no more than a remote interest in the issue actually involved in this litigation. The case at bar involves the ques-

tion whether the National Railroad Adjustment Board (hereinafter referred to as Board) exceeded its jurisdiction in establishing a new grievance procedure (Medical arbitration panel) to which the parties to the collective bargaining agreement must appeal. Association would utilize this case as a vehicle to inject an entirely new issue over whether the decisions of the Board are final and binding except for money awards.

2. The issue which Association seeks to discuss in its brief *amicus curiae* is completely foreign to the issue now before this Court. The burden of Association's argument is that the decisions of the Board should not be reviewed by courts because it views the Board as a board of arbitration similar to those in the non-railroad field where arbitration is a matter of agreement between the parties and not a part of the statutory procedure for resolving contractual questions. This question is not present in this case. The issue here is whether the Board exceeded its jurisdiction. Association cannot and does not argue that the decision of any board of arbitration may not be reviewed by the courts where the board acted without jurisdiction.

3. For more than four months prior to filing its motion, counsel for Association has known (by virtue of a letter from Respondent's counsel dated May 17, 1965) that the Respondent withholds consent to the filing of a brief *amicus curiae* by Association. Meanwhile, Respondent's counsel has received Petitioner's brief and has been proceeding with the preparation of the Respondent's brief. Under all the circumstances, it is submitted that the delay in the submission of Association's motion is an additional reason why it should be denied.

CONCLUSION

For each and all of the foregoing reasons, Association's motion should be denied.

Dated: October 5, 1965.

Respectfully submitted,

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WILLIAM R. DENTON

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Company*

SUPREME COURT OF THE UNITED STATES

No. 27.—OCTOBER TERM, 1965.

F. J. Gunther, Petitioner,	} On Writ of Certiorari	
v.		to the United States
San Diego & Arizona Eastern Railway Company.		Court of Appeals for the Ninth Circuit.

[December 8, 1965.]

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner Gunther worked as a fireman for respondent railroad for eight years, from 1916 to 1924, and as an engineer for 30 years, from 1924 until December 30, 1954. On that date, shortly after his seventy-first birthday, he was removed from active service because of an alleged physical disability. The railroad's action was taken on the basis of reports made by its physicians, after physical examinations of petitioner, that in their opinion he was no longer physically qualified to work as a locomotive engineer because his "heart was in such condition that he would be likely to suffer an accute coronary episode." Dissatisfied with the railroad doctors' findings, Mr. Gunther went to a recognized specialist who, after examination, concluded that petitioner was qualified physically to continue work as an engineer. On the basis of this report petitioner requested the railroad to join him in the selection of a three-doctor board to re-examine his physical qualifications for return to service. The railroad refused. This disagreement led to prolonged litigation which has reached us 11 years after the controversy arose.

When the railroad refused to appoint a new board of doctors to re-examine petitioner or to restore him to service, he filed a claim for reinstatement and back pay with the Railroad Adjustment Board, which was created by § 3 of the Railway Labor Act¹ to adjust, among

¹ 48 Stat. 1185, 45 U. S. C. § 151 *et seq.*

other things, disputes of railroads and their employees "growing out of grievances or out of the interpretation or application of agreements concerning . . . rules, or working conditions" ² The Adjustment Board, over the protests of the railroad, decided it had jurisdiction of the grievance and then referring to past practice in similar cases, proceeded, as its findings show, to appoint a committee of three qualified physicians, to re-examine petitioner, "one chosen by carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to claimant's disability and the propriety of his removal from service. . . ." Subsequently, this committee of doctors examined petitioner and decided by a majority vote that he was physically qualified to act as an engineer, contrary to the prior findings of the railroad's doctors. Upon the basis of these findings the Adjustment Board decided that the railroad had been wrong in disqualifying petitioner for service and sustained his claim "for reinstatement with back pay for all time lost from October 15, 1955" The railroad refused to comply with the Board's order and petitioner as authorized by the Act ³

² Section 3 First (i), 48 Stat. 1191, 45 U. S. C. § 153 (i). This section also provides that disputes between railroad employees and their employers "failing to reach an adjustment . . . may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

³ Section 3 First (p), 48 Stat. 1192, 45 U. S. C. § 153 (p) provides: "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner . . . may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier . . . a petition setting forth briefly . . . the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed

filed this action in a district court of the United States for an appropriate court order to enforce the Adjustment Board's award. After hearings the District Court, in its third opinion in the case, held the award erroneous and refused to enforce it.⁴ The District Court's refusal was based on its conclusion that there were no express or implied provisions in the collective bargaining contract which in the court's judgment limited in any way what it found to be the absolute right of the railroad, in absence of such provisions, to remove petitioner from active service whenever its physicians found in good faith "that plaintiff was physically disqualified from such service." The Court of Appeals affirmed, agreeing with the interpretation put upon the contract by the District Court, and thereby rejected the Board's interpretation of the contract and its decision on the merits of the dispute. 336 F. 2d 543. We granted certiorari because the holding of the two courts below seemed, in several respects, to run counter to the requirements of the Railway Labor Act as we have construed it. — U. S. —.

I. Section 3 First (i) of the Railway Labor Act provides that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements" are to be handled by the Adjustment Board.

in all respects as other civil suits except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated. . . . The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

⁴ 192 F. Supp. 882, 198 F. Supp. 402. The third opinion written by the court is not reported.

In § 3 Congress has established an expert body to settle "minor" grievances like petitioner's which arise from day-to-day in the railroad industry. The Railway Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs, and practices. See *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239, 243-244. The Board's decision here fairly read shows that it construed the collective bargaining provisions which secured seniority rights, together with other provisions of the contract, as justifying an interpretation of the contract guaranteeing to petitioner "priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified." The District Court, whose opinion was affirmed by the Court of Appeals, however, refused to accept the Board's interpretation of this contract. Paying strict attention only to the bare words of the contract and invoking old common-law rules for the interpretation of private employment contracts, the District Court found nothing in the agreement restricting the railroad's right to remove its employees for physical disability upon the good-faith findings of disability by its own physicians. Certainly it cannot be said that the Board's interpretation was wholly baseless and completely without reason. We hold that the District Court and the Court of Appeals as well went beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement. As hereafter pointed out Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad

men, both workers and management, acting on the Adjustment Board with their long experience and accepted expertise in this field.

II. The courts below were also of the opinion that the Board went beyond its jurisdiction in appointing a medical board of three physicians to decide for it the question of fact relating to petitioner's physical qualifications to act as an engineer. We do not agree. The Adjustment Board, of course, is not limited to common-law rules of evidence in obtaining information. The medical board was composed of three doctors, one of whom was appointed by the company, one by petitioner, and the third by these two doctors. This not only seems an eminently fair method of selecting doctors to perform this medical task but it appears from the record that it is commonly used in the railroad world for the very purpose it was used here. In fact the record shows that under respondent's present collective bargaining agreement with its engineers provision is made for determining a dispute precisely like the one before us by the appointment of a board of doctors in precisely the manner the Board used here. This Court has said that the Railway Labor Act's "provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field."⁵ On a question like the one before us here, involving the health of petitioner, and his physical ability to operate an engine, arbitrators would probably find it difficult to find a better method for arriving at the truth than by the use of doctors selected as these doctors were. We reject the idea that the Adjustment Board in some way breached its duty or went beyond its power in relying as it did upon the finding of this board of doctors.

⁵ *Brotherhood of Railroad Trainmen et al. v. Chicago River & Indiana R. Cos.*, 353, U. S. 31, 39.

III. Section 3 First (m) provides that Adjustment Board awards "shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award."⁶ The award of the Board in this case, based on the central finding that petitioner was wrongfully removed from service is two-fold, consisting both of an order of reinstatement and the money award for lost earnings. Thus there arises the question of whether the District Court may open up the Board's finding on the merits that the railroad wrongfully removed petitioner from his job merely because one part of the Board's order contained a money award. We hold it cannot. This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railway Adjustment Board. In *Brotherhood of Railroad Trainmen et al. v. Chicago River & Indiana R. Co.*, 353 U. S. 31, the Court gave a Board decision the same finality that a decision of arbitrators would have. In *Union Pacific R. Co. v. Price*, 360 U. S. 601, the Court discussed the legislative history of the Act at length and pointed out that it "was designed for effective and final decision of grievances which arise daily" and that its "statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board" 360 U. S., at 616. Also in *Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U. S. 33, the Court said that prior decisions of this Court had made it clear that the Adjustment Board provisions were to be considered as "compulsory arbitration in this limited field," p. 40, "the complete and final means for settling minor disputes," p. 39, and "a mandatory, exclusive, and comprehensive system for resolving grievance disputes." P. 38.

⁶ 48 Stat. 1191, 45 U. S. C. § 153 (m).

The Railway Labor Act as construed in the foregoing and other opinions of this Court does not allow a federal district court to review an Adjustment Board's determination of the merits of a grievance merely because a part of the Board's award, growing from its determination on the merits, is a money award. The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court.

IV. There remains the question of further proceedings in this case with respect to the money aspect of the Board's award. The Board did not determine the amount of back pay due petitioner on account of his wrongful removal from service. It merely sustained petitioner's claim for "reinstatement with pay for all time lost from October 15, 1955." Though the Board's finding on the merits of the wrongful discharge must be accepted by the District Court, it has power under the Act to determine the size of that money award. The distinction between court review of the merits of a grievance and the size of the money award was drawn in *Locomotive Engineers v. Louisville & Nashville R. Co.*, *supra*, at pp. 40-41, when it was said that the computation of a time-lost award is "an issue wholly separable from the merits of the wrongful discharge issue." On this separable issue the District Court may determine in this action how much time has been lost by reason of the wrongful removal of petitioner from active service, and any proper issues that can be raised with reference to the amount of money necessary to compensate for the time lost. In deciding this issue as to how much money petitioner will be entitled to receive because of lost time, the

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District Court will bear in mind the fact that the decision on the merits of the wrongful removal issue related to the time when the Board heard and decided the case. Eleven years have elapsed since that time, long enough for many changes to have occurred in connection with petitioner's health. This would, of course, be relevant in determining the amount of money to be paid him in a lawsuit which can, as the statute provides, proceed on this separable issue "in all respects as other civil suits" where damages must be determined.

The judgments of the courts below are reversed and the cause is remanded to the District Court for considerations not inconsistent with this opinion.

Reversed and remanded.